**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | |
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| State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants. | 05-CV-0329 GKF-SAJ **AFFIDAVIT OF DARA D. MANN** |

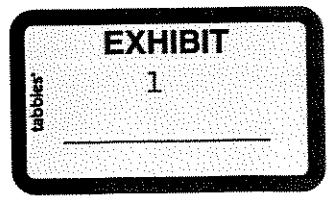
STATE OF GEORGIA )
) ss.
COUNTY OF COBB )

I, Dara D. Mann, hereby depose and state as follows:

1. I am an attorney at Faegre and Benson, LLP. I represent Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants") in the above-captioned litigation. I make this affidavit on personal knowledge and submit it in support of the Cargill Defendants' Response to Plaintiffs' Motion to Compel.

2. Since approximately January 2006, I have supervised the Cargill Defendants' efforts to collect, review and produce documents pertinent to the Cargill Defendants' disclosure obligations under Rule 26(a)(1) of the Federal Rules of Civil Procedure and/or responsive to the discovery requests served by Plaintiffs.

3. In an effort to identify discoverable documents relating to the Cargill Defendants' turkey production activities in the Illinois River Watershed ("IRW"), attorneys and paralegals from the Cargill Defendants' Legal Department, Rhodes Hieronymus and



Faegre & Benson LLP have interviewed employees and searched for and gathered documents from the Cargill Defendants' present and former facilities located in Springdale and Gentry, Arkansas ("the Springdale complex"). In addition, these attorneys and paralegals have interviewed employees and searched for and gathered documents from the Cargill Defendants' facilities in Minnesota and Kansas to the extent that they relate to the Springdale complex.

4. The effort to collect potentially responsive documents included without limitation central files, employee offices, off-site storage locations and electronic storage systems.

5. Not including the fees and travel expenses of attorneys and paralegals with multiple responsibilities in this action, to date, the Cargill Defendants have spent in excess of $1,000,000 in costs and fees solely related to collecting, reviewing and producing hard copy and electronic documents related to the Springdale complex that are responsive to Plaintiffs' discovery requests.

6. Although I cannot provide an exact estimate of the costs that would be involved in collecting, reviewing and producing documents relating to the Cargill Defendants' turkey production activities that are wholly unrelated to the Springdale complex and thus outside the IRW, I anticipate that the Cargill Defendants' costs will be approximately the same for each additional turkey production complex.

7. In addition to the Springdale complex, Cargill also has domestic turkey production complexes in California (Missouri), Waco (Texas) and Harrisonburg (Virginia). Thus, it is anticipated that Cargill would incur costs in excess of $3,000,000 solely related to identifying and producing responsive documents, if required to do so for all domestic turkey

production complexes outside the IRW.

8. During the meet and confer process with Plaintiffs with regard to the Cargill Defendants' responses to their July 10, 2006 document requests, among other things, counsel for Cargill (a) attempted to explore with Plaintiffs reasonable alternatives for limiting the temporal scope of Plaintiffs' requests, including asking for identification of particular requests for which a longer temporal scope might be justified and (b) advised Plaintiffs that, whenever the Cargill Defendants objected to certain terms as vague or ambiguous, they had nonetheless endeavored to produce documents based on the plain English meaning of said terms.

9. Plaintiffs have made no attempt to meet and confer with counsel for the Cargill Defendants with regard to alleged "improper" confidentiality designations or Plaintiffs alleged "confusion" over the method in which the Cargill Defendants determined to produce documents pursuant to Rule 34 of the Federal Rules of Civil Procedure.

10. Attached as Exhibit 1 is a true and correct copy of a letter from Robert W. George to Louis W. Bullock dated April 24, 2007.

11. Attached as Exhibit 2 is a true and correct copy of the unpublished case, Moss v. Blue Cross & Blue Shield of Kansas, Inc., 2007 U.S. Dist. LEXIS 25301 (D. Kan. Apr. 2, 2007).

12. Attached as Exhibit 3 is a true and correct copy of the unpublished case, Williams v. Sprint/United Management Co., 2006 U.S. Dist. LEXIS 69051 (D. Kan. Sept. 25, 2006).

13. Attached as Exhibit 4 is a true and correct copy of the unpublished case, Apsley v. Boeing Co., 2007 U.S. Dist. LEXIS 5144 (D. Kan. Jan. 17, 2007).

14. Attached as Exhibit 5 is a true and correct copy of "State of Oklahoma's Response to Defendants' Requests For Admission" dated April 20, 2007.

15. Attached as Exhibit 6 is a true and correct copy of "Objections and Responses of State of Oklahoma to Separate Defendant Cargill Turkey Production, LLC's Amended First Set of Interrogatories and Request for Production Propounded to Plaintiffs" dated December 11, 2006.

THIS CONCLUDES MY AFFIDAVIT.

Dara D. Mann

Subscribed and sworn to before me
this 26th day of April 2007.

Notary Public
My commission expires:

fb.us.1985473.04

KATHY E. OLMSCHEID
Notary Public
Minnesota
My Commission Expires January 31, 2011

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April 24, 2007

**VIA E-MAIL AND FACSIMILE**

Louis W. Bullock
Miller, Keffer, Bullock & Pedigo LLC
222 S. Kenosha Avenue
Tulsa, Oklahoma 74120

Re: *State of Oklahoma v. Tyson Foods, Inc., et al.*
Northern District Court of Oklahoma No. 05-CV-0329-GKF -SAJ

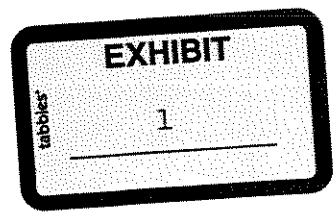
Dear Louis:

I tried unsuccessfully to reach you by telephone earlier today. Please consider this letter my final attempt to resolve our dispute over the State's refusal to identify the location (by GPS coordinates) where each of the samples referenced in the State's February 1 and February 8 production were collected. I wrote to you on February 28, 2007, concerning this issue and stated:

> I suspect that the State has compiled a list showing sample identification numbers and GPS coordinates for the location from which each sample was collected. The Cobb-Vantress discovery requests which led to the court-ordered production of the State's sampling data specifically asked the State to provide GPS coordinates for each sample. If such a list exists, please produce it immediately.

(2/28/07 Correspondence from R. George to L. Bullock). In our conversations that followed my February 28, 2007 letter, you confirmed that the State has access to a list of GPS coordinates for each sample taken in the IRW but then asserted that the State was not obligated to produce this list. Instead, you referred to me the "field notebooks" included within the State's document production and represented that GPS coordinates for all of the samples could be readily identified from a review of those field notebooks. We have reviewed the field notebooks and have attempted to cross reference GPS coordinates noted in those field notebooks with samples or sample locations identified in the lab reports produced by the State. Unfortunately, the field notebooks do not identify the GPS coordinates for many of the State's sampling sites. We have lab reports on hundreds of samples taken from sampling sites for which we are unable to identify GPS coordinates within the field notebooks.





This situation must be corrected immediately. The interrogatories which were the subject of Magistrate Joyner's order expressly asked for GPS coordinates for the location from which each sample was collected. This is purely factual information which you have admitted the State has access to, but yet it has not been produced. Absent written confirmation by noon tomorrow, April 25, 2007, that the State will promptly provide a list of GPS coordinates by sample identification number, I will file a motion with the Court asking that this issue be addressed at the April 26th hearing on Cargill's Motion to Compel.

I look forward to your response to this letter. You can reach me anytime tomorrow at the number above or on my mobile phone at 479-530-0965.

Cordially,

Robert W. George

cc: Defense Counsel (via e mail)

LEXSEE 2007 U.S. DIST. LEXIS 25301

**MICHELE N. MOSS, Plaintiff, v. BLUE CROSS AND BLUE SHIELD OF KANSAS, INC., Defendant.**

**Case No. 06-4105-JAR**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**

**2007 U.S. Dist. LEXIS 25301**

**April 2, 2007, Decided**
**April 2, 2007, Filed**

**COUNSEL:** [*1] For Michele N Moss, Plaintiff: Casey Jenkins, Harold S. Youngentob, LEAD ATTORNEYS, Goodell, Stratton, Edmonds & Palmer - Top, Topeka, KS.

For Blue Cross and Blue Shield of Kansas, Inc., Defendant: Lora M. Jennings, Terry L. Mann, LEAD ATTORNEYS, Martin, Pringle, Oliver, Wallace & Bauer, LLP -- Wichita, Wichita, KS.; Stacy A. Jeffress, LEAD ATTORNEY, Blue Cross and Blue Shield of Kansas, Inc. - Topeka, Topeka, KS.

**JUDGES:** K. Gary Sebelius, U.S. Magistrate Judge.

**OPINION BY:** K. Gary Sebelius

**OPINION:**

**MEMORANDUM AND ORDER**

Plaintiff filed the present Motion to Compel Answers to Interrogatories and Request for Productions on January 25, 2007 (Doc. 29). Defendant Blue Cross and Blue Shield of Kansas ("BCBSKS") filed a response (Doc. 48), to which plaintiff has replied (Doc. 49). The issues are therefore fully briefed and ripe for discussion.

**I. Background**

Plaintiff has brought her claims under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. 2601 *et seq.* Specifically, plaintiff contends that defendant "violat[ed] the FMLA [by] interfering with, restraining and denying the Plaintiff's exercise or attempt to exercise her right to use protected leave. [*2] " n1 For the purposes of the present motion, the court will construe plaintiff's pleadings as also claiming FMLA retaliation against defendant. n2

n1 *See* Notice of Removal (Doc. 1) (Attachment 1) at p. 4.

n2 The record is not clear as to whether plaintiff claims FMLA retaliation. *See id.* However, because the facts alleged in plaintiff's state court petition read broadly could include a claim of FMLA retaliation, for the purposes of the present motion, the court will construe plaintiff's pleading accordingly.

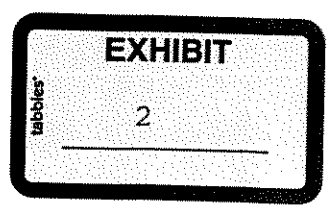
Plaintiff filed the present motion seeking to compel responses to Interrogatory Nos. 8, 9, and 10 and production of documents to Request Nos. 2, 3, 7, 8, 13-18, and 20. As detailed below, the court grants in part and denies in part the present motion.

**II. Interrogatories**

**A. Interrogatory Nos. 8 and 9.**

**Interrogatory No. 8**

List any and all employees in the last 10 years who have been terminated or disciplined, reprimanded, or suffered any type of adverse employment [*3] action whatsoever, for violating BCBSKS'



FMLA leave policy and in relation to the employees' identity provide the following:
-Any documents evidencing or supporting the terminations, discipline, reprimand or adverse employment action
-The date of such action
-The supervisors, management, or any person in a position of authority who participated in such action
-The personnel file of the employee involved in such action

Response:
Defendant objects to this interrogatory as being overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. There is no way to identify the designated employees other than by reviewing the personnel files of every person who work for the defendant during the past ten years. That would include thousands of employees, and the time commitment necessary to review of the personnel files would be quite burdensome.

**Interrogatory No. 9**

List any and all employees who have been terminated, disciplined, reprimanded, or have been subject to any type of adverse employment action for failing to call in for two consecutive days pursuant to document BCBSKS000025, second paragraph that provides for [*4] this policy according to documents produced by BCBSKS.

> -Any documents evidencing or supporting the termination, discipline, reprimand or adverse employment action.
> -The date of such action
> -The supervisors, management, or any person in a position of authority who participated in such action.
> -The personnel file of the employee involved in such action

> Response: Defendant objects to this interrogatory as being overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The interrogatory is unlimited by any date range, and thus calls for information throughout the years that defendant has utilized the referenced policy, or one with similar requirements. Furthermore, the only way to identify the employees is by reviewing the personnel files of all current and former employees who worked for defendant while such a policy was in effect. The time commitment to review all such personnel files would be quite burdensome.

**1. Relevancy Objection**

Generally, "a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party. [*5] " n3 "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad discovery." n4 When relevancy is not readily apparent, however, the party seeking discovery has the burden of showing the relevancy of the discovery request. n5

n3 *Sheldon v. Vermonty*, 204 F.R.D. 679, 689-90 (D. Kan. 2001). *See also* Fed. Rule Civ. P. 26(b)(1).

n4 *Gen. Elec. Capital Corp. v. Lear Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2004).

n5 *Pulsecard, Inc. v. Discover Card Services*, 168 F.R.D. 295, 309 (D. Kan. 1996)(citation omitted).

Plaintiff argues that Interrogatory [*6] Nos. 8 and 9 are "clearly relevant on [their] face, as [they] seek[] information to determine if BCBS is a continuous violator of federal law." n6 However, proving that BCBS is a "continuous violator of federal law" does not appear relevant to any of the FMLA claims or defenses of the parties. Thus, plaintiff bears the burden of demonstrating the relevancy of Interrogatory Nos. 8 and 9.

n6 Memorandum in Support (Doc. 30) at p. 7.

Plaintiff offers two reasons why these Interrogatories are relevant. First, plaintiff argues that "[i]n employment cases, like this case, the scope of discovery is particularly broad and an employer's general practices and operations are relevant even if the plaintiff is asserting an individual employment violation, like the FMLA." n7 Plaintiff is correct in that the Tenth Circuit has stated that "discovery in [employment] discrimination claims should not be narrowly circumscribed." n8 Indeed, such information is relevant in employment discrimination cases because "the testimony [*7] of other employees about their treatment by the defendant is relevant to the issue of the employers discriminatory intent." n9

n7 *Id.* at 5.

n8 *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995) (citing *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 343-44 (10th Cir. 1975)).

n9 *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990).

Second, plaintiff argues, and the court agrees, that answers to Interrogatory Nos. 8 and 9 could lead to evidence as to whether BCBSKS uniformly applied its FMLA or its attendance "call in" policies. BCBSKS argues that its legitimate non-discriminatory reason for terminating plaintiff stems from her failure to meet its call in policy. n10 As part of a FMLA retaliation claim, plaintiff could prove this reason was a pretext. As "[a] plaintiff can demonstrate pretext by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's reasons for its action [*8] . . ." n11 information regarding BCBSKS' application of its FMLA n12 or its "call in" policies n13 could lead to relevant evidence. Thus, the court finds that plaintiff has met her burden of establishing relevancy, and the court overrules defendant's objection.

n10 *See* Answer (Doc. 8) at p. 3-4; Response (Doc. 48) ("Plaintiff was terminated . . . because she failed to adhere to the company's policy requiring employees to contact their supervisor each day they are absent, unless leave has been approved.").

n11 *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997).

n12 *See Batt v. Kimberly-Clark Corp.*, No. 05-0421, 2006 U.S. Dist. LEXIS 37482 at *10-11 (N.D. Okla. June 6, 2006)(upholding the Magistrate's order requiring defendant to identify all employees who had made FMLA requests).

n13 *See Moody v. Honda of Am. Mfg.*, No. 05-0880, 2006 U.S. Dist. LEXIS 43092 at *18-19 (S.D. Ohio June 26, 2006)(holding as to plaintiff's FMLA retaliation claim that "discovery of information concerning other similarly-situated employees is reasonably calculated to lead the discovery of admissible evidence.").

[*9]

**2. Overly Broad and Unduly Burdensome**

As the party objecting to discovery, defendant has "the burden of showing facts justifying their objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome." n14 Defendant has failed to provide an "affidavit or specific supporting information" to substantiate its overly broad and unduly burdensome objections to Interrogatory Nos. 8 and 9. Thus, defendant has not met its "obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money, and procedure required to produce the requested documents." n15 Further, the "mere fact that

compliance with an inspection order will cause great labor and expense or even considerable hardship and the possibility of injury to the business of the party from whom discovery is sought does not itself require denial of the motion." n16

n14 *Horizon Holdings Inc. v. Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D. Kan. 2002) (citing *Snowden v. Connaught Lab., Inc.*, 137 F.R.D. 325, 332 (D. Kan. 1991)).

[*10]

n15 *Id.*

n16 *Snowden v. Connaught Lab., Inc.*, 137 F.R.D. 325, 332-33 (D. Kan. 1991).

**3. Overly Broad and Unduly Burdensome on Their Face.**

However, defendant's failure to specify its potential burden is not dispositive of its objection. As defendant points out, an objecting party's "failure to meet its evidentiary burden is not necessarily fatal to its claim that the requests are unduly burdensome" because "an exception . . . applies when the discovery request is unduly burdensome on its face." n17 Courts in the District of Kansas have "held on numerous occasions that a request or interrogatory is unduly burdensome on its face if it used the omnibus term 'relating to' or 'regarding' with respect to a general category or group of documents." n18 Yet the request need not use "relating to" or "regarding" because the request's "overall wording" can make the request facially unduly burdensome and overly broad. n19 Courts often ask whether the request's wording "requires the answering party to 'engage in mental gymnastics to determine what information may or may not [*11] be remotely responsive.'" n20

n17 *Aikens v. Deluxe Fin. Servs.*, 217 F.R.D. 533, 537-38 (D. Kan. 2003).

n18 *Id.*

n19 *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 666 (D. Kan. 1999).

n20 *Aikens*, 217 F.R.D. at 538 (emphasis added).

Defendant chiefly argues that to locate any employee who has suffered "any type of adverse employment action" due to either violation of defendant's FMLA policy n21 or defendant's "call in" attendance policy n22 would require review of more than 1,800 personnel files. Moreover, defendant argues that determining "any type of adverse employment action" would include undocumented incidents of employees who had received verbal warnings or counseling. Consequently, collection of such "anecdotal evidence would require interviewing every current and former supervisor who worked for the company in the past five years." n23 Defendant also argues Interrogatory No. 9 is not narrowed as to temporal scope [*12] and that even to limit Interrogatory No. 9 to the past five years, as suggested by defendant, n24 would still require reviewing 1,800 personnel files.

n21 Interrogatory No. 8.

n22 Interrogatory No. 9.

n23 Response (Doc. 48) at p. 8. n.4.

n24 The defendant employed plaintiff for five years.

The court agrees that to determine "any type of adverse employment action" would require defendant to engage in mental gymnastics in order to determine what might be remotely responsive as to Interrogatory Nos. 8 and 9. Moreover, the court finds the lack of temporal scope of Interrogatory No. 9 is facially over broad.

However, the court also finds that a review of 1,800 files is not necessarily overly broad or unduly burdensome on its face. Plaintiff argues that FMLA leave and termination for attendance is specifically coded by BCBSKS. Plaintiff concludes, and defendant does not

refute, that such coding could easily be searched by computer. n25 As plaintiff suggests, a simple computer search could produce [*13] information sufficient to respond to both Interrogatories or, at a minimum, guide defendant's further searches. Consequently, the court finds that a review of 1,800 files is not in and of itself overly broad and unduly burdensome on its face.

n25 Memorandum in Support (Doc. 30) at p. 8-10.

**a. Adequate Guidance Exists.**

That the court has found in some respects Interrogatory Nos. 8 and 9 to be overly broad and unduly burdensome, "does not automatically relieve [the objecting party] of its obligation to provide responses . . . to the extent the request is not objectionable." n26 However, the court will not require a party "to respond to an overly broad discovery request unless adequate guidance exists as to what extent the request is not objectionable."

n26 *Aikens*, 217 F.R.D. at 538 (emphasis in original). *See also* Fed. R. Civ. P. 33(b)(1); *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 198 (D. Kan. 1996) (requiring no answer "unless adequate guidance exists as to what extent the interrogatory is not objectionable.").

[*14]

In establishing guidance and to avoid crafting an arbitrary order, "the court must define the extent to which the interrogatory is reasonably answerable and not objectionable." n27 To this end, the court may use "other matters of record [to] define the discoverability of certain information encompassed by the interrogatory." n28

n27 *Aikens*, 217 F.R.D. at 538-39 (D. Kan. 2003) (quoting *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 198 (D. Kan. 1996)).

n28 *Id.* at 539. *See also Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 209 F.R.D. 208, 215 (D. Kan. 2002) (citing *Mackey*, 167 F.R.D. at 197).

Consequently, the court directs defendant to respond to Interrogatory No. 8 to the extent it seeks to obtain information regarding only those employees who have been terminated or disciplined in writing (including reprimands) for violating BCBSKS' FMLA policy. As to Interrogatory No. 9, plaintiff proposes that defendant "could at least provide . . . [*15] all employees terminated for attendance." Thus, the court further directs defendant to respond to Interrogatory No. 9 to the extent it seeks information regarding *documented* instances of employee termination for attendance within the last five years.

**B. Interrogatory No. 10.**

**Interrogatory No. 10**

Identify any and all persons (other than Plaintiff) who, from January 1, 1996, to the present, have filed a lawsuit, complaint, administrative charge, or claim of sexual harassment, Title VII violations, ADA violations, ADEA violations, or FMLA violations against BCBSKS and provide the following in relation to the claim lawsuit, complaint, administrative charge, or claim of sexual harassment, Title VII violations, ADA violations, ADEA violations, or FMLA violations:
-The name of the attorney who represented the individual
-The resolution of the lawsuit, complaint, administrative charge, or claim
-The supervisors, managers, or upper level employees involved with handling or investigating the lawsuit, complaint, administrative charges, or claim
-The case caption and number, court (if lawsuit was actually filed), and ultimate outcome

Response: Defendant objects [*16] to this interrogatory as being overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff does not assert any claims under Title VII, the ADEA, the ADA, and the deadline for

amending the pleadings to assert new claims has passed. n29

n29 Defendant lists the two FMLA federal lawsuits filed against it in the previous ten years, the attorneys involved, the status of the case, and the identity of the in-house counsel for BCBSKS who have handled these cases.

**1. Relevancy Objection**

The court finds Interrogatory No. 10 lacks relevancy on its face. Plaintiff argues that Interrogatory No. 10 is relevant because "this information can prove . . . that BCBS has a pattern of violating federal employment law." n30 Again, whether defendant previously "violated federal law" other than the FMLA does not appear facially relevant to plaintiff's FMLA claims.

n30 Memorandum in Support (Doc. 30) at p. 11

[*17]

**a. Plaintiff's reliance on *Sonnino v. University of Kansas Hospital Authority* is not persuasive.**

As Interrogatory No. 10 does not appear facially relevant, plaintiff bears the burden of proving its relevancy. In support, plaintiff cites *Sonnino v. University of Kansas Hospital Authority* for the proposition that "[i]t is well established that '[d]iscovery requests-even though they will most likely discover some information about complaints and problems of a different type and magnitude than the alleged complaints and problems relating to Plaintiff-are still likely to lead to the discovery of admissible evidence.'" n31

n31 *Id.* (citing *Sonnino v. Univ. of Kansas Hosp. Auth.*, 220 F.R.D. 633, 646 (D. Kan. 2004)).

*Sonnino* merely supports the proposition that broad discovery is permissible in employment discrimination cases. In *Sonnino*, the plaintiff, a female physician, filed a Title VII claim against her employer hospital alleging, in part, that her employer had [*18] disciplined her differently than male physicians engaging in similar conduct. n32 The court reasoned that information regarding the range of complaints filed against other physicians was relevant to plaintiff's claim that her defendant employer had responded to complaints against male physicians differently than it had with plaintiff. n33 Thus, the discovery requests seeking other complaints against male physicians would "likely to lead to the discovery of admissible evidence." n34

n32 *Sonnino*, 220 F.R.D. at 643.

n33 *Id.*

n34 *Id.* at 646 (emphasis added).

The present case simply is factually distinguishable from *Sonnino*. Indeed, the language in *Sonnino* as to the relevancy of "complaints and problems of a different type and magnitude than the alleged complaints" addressed complaints filed *against* the defendant's employees, not complaints filed by its employees, as sought here.

Additionally, as a general rule, "[o]ther claims of discrimination against [*19] a defendant are discoverable only if limited to the same *form* of discrimination . . . ." n35 In light of this rule, plaintiff's misplaced reliance on *Sonnino* and because plaintiff offers no other argument as to the relevancy of Interrogatory No. 10, the court sustains defendant's objection.

n35 *Mitchell v. National Railroad Passenger Corp.*, 208 F.R.D. 455, 460 (D.D.C. 2002)(emphasis added); *see also Gheesling v. Chater*, 162 F.R.D. 649, 651 (D. Kan. 1995) (holding that in an age discrimination case, "[t]he only possible relevant inquiry in this case would be an inquiry into complaints of age discrimination; and other EEOC complaints have no conceivable relevance to an age discrimination case.");

To the extent Interrogatory No. 10 seeks information regarding the identity of persons who have filed lawsuits,

complaints, administrative charges or claims of violation of the FMLA since January 1, 1996, the court finds this inquiry reasonably calculated to lead to the discovery [*20] of admissible evidence in this case. As a result, the court will compel defendant to answer Interrogatory No. 10 as it relates to claims of violations of the FMLA by the defendant.

**II. Document Requests**

Plaintiff seeks to compel production of documents responsive to Document Request Nos. 2, 3, 7, 8, 13-18, and 20. As discussed below, plaintiff's motion is granted as to Request Nos. 8, and 13-18.

**A. Document Requests Nos. 2 and 3.**

**Document Request No. 2**

> Any and all correspondence of any kind either to or from Michele Moss that is in the possession of BCBSKS.
>
> Response: Defendant objects to the request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The request is so broad that it would conceivably include proprietary and confidential correspondence of various kinds between plaintiff and the heath care providers that are in defendant's network, email messages between plaintiff and her non-supervisory co-workers that happen to reside on defendant's computer system, and the like. All nonprivileged correspondence regarding plaintiff's absences in May of 2006 and plaintiff's termination [*21] have previously been produced herein.

**Document Request No. 3**

> Any documents bearing Michele Moss' name that you have in your possession or control.
>
> Response: Defendant objects to the request as being overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's name could appear in the company newsletter, birthday lists, lists of employees who subscribed to certain benefits, and other documents which have nothing to do with the claims plaintiff asserts in this case. To search through every document in defendant's possession to determine whether it lists plaintiff's name would be extraordinarily burdensome and time-consuming. Defendant has previously produced plaintiff's personnel file, FMLA file, workers compensation file, and unemployment claim file.

**1. Overly Broad and Unduly Burdensome**

Defendant argues that both Request No. 2 and 3 are overly burdensome and unduly burdensome on their face, and the court agrees. An objecting party's "failure to meet its evidentiary burden is not necessarily fatal to its claim that the requests are unduly burdensome" because "an exception . . . applies when [*22] the discovery request is unduly burdensome on its face." n36 Courts often ask whether the request's wording "requires the answering party to 'engage in mental gymnastics to determine what information may or may not be remotely responsive.'" n37

n36 *Aikens v. Deluxe Fin. Servs.*, 217 F.R.D. 533, 537-38 (D. Kan. 2003) (citations omitted).

n37 *Id.* at 538 (emphasis added).

Here, the court finds that requesting defendant to supply plaintiff with all correspondence of *any* kind sent either to or from plaintiff, as sought in Request No. 2, is overly broad on its face. As both parties note, plaintiff's five years of employment at BCBSKS required her to extensively communicate with the providers in BCBSKS' network. Further, defendant would have to search through every other employee's correspondence to determine what had been sent from other employees to plaintiff.

As to Request No. 3, in plaintiff's motion to compel,

plaintiff agrees that "Request No. 3 is probably too broad. [*23] " n38 Thus, plaintiff "withdraw[s]" this request "and substitute[s] the following: Any document bearing Michele Moss' name that is either from or to Moss and another supervisor, manager, or anyone holding a higher position within the company unrelated to insurance benefits or servicing customer service requests from outside individuals." n39 Defendant responds that the Federal Rules do not allow the court to "approve" a document request prior to the service of such request. The court does note that defendant apparently has provided plaintiff with "[a]ll nonprivileged correspondence regarding plaintiff's absences in May of 2006" n40 and plaintiff's "termination" and "plaintiff's personnel file, FMLA file, workers compensation file and unemployment claim file." n41

n38 Memorandum in Support (Doc. 30) at p. 14.

n39 *Id.*

n40 Response (Doc. 48) at p. 14.

n41 *Id.* at 13.

The fact that the Request Nos. 2 and 3 are facially overly broad, however, "does not automatically relieve [the objecting [*24] party] of its obligation to provide responses . . . to the extent the request is not objectionable." n42 While the court agrees with defendant that it cannot "approve" of a substituted Request for Production, courts in the District of Kansas have used suggestions made by parties to craft guidance as to how the request at issue is not objectionable. However, to that end, the court finds plaintiff's strangely worded "substituted request" insufficient guidance. n43 There may very well be documents in defendant's possession which are relevant or contain information which reasonably could lead to the discovery of admissible evidence regarding plaintiff's claims or defendant's defenses. But, plaintiff's suggestion to narrow the request to excluding from production only those documents involving "insurance benefits or serving customer service requests from outside individuals" n44 does not sufficiently provide guidance to resolve the problems presented by plaintiff's overly broad requests.

n42 *Aikens*, 217 F.R.D. at 538 (emphasis in original). *See also* Fed. R. Civ. P. 33(b)(1); *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 198 (D. Kan. 1996) (requiring no answer "unless adequate guidance exists as to what extent the interrogatory is not objectionable.").

[*25]

n43 *Id.* at 539. *See also Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 209 F.R.D. 208, 215 (D. Kan. 2002) (citing *Mackey*, 167 F.R.D. at 197).

n44 Memorandum in Support (Doc. 30) at p. 14.

Moreover, the court can fashion no reasonable guidance on its own to define the extent to which either Request No. 2 or 3 are not objectionable. Because the court will not require a party "to respond to an overly broad discovery request unless adequate guidance exists as to what extent the request is not objectionable" defendant's overly broad and unduly burdensome objections are sustained.

**B. Document Request Nos. 7 and 20.**

**Document Request No. 7**
Any and all documents from the previous 5 years to the present date relating to any legal action, civil or criminal, in which defendant has been involved either as a party, a witness, a plaintiff, a defendant or otherwise, pertaining to violations of Title VII, the ADEA, ADA, racial discrimination, sex discrimination, or violating the FMLA of 1993.

Response:
Defendant objects to the request [*26] as being overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. n45

**Document Request No. 20**
Any and all confidential settlement agreements arising out of relating to claims of sex, race, or age discrimination, violations of ADA, ADEA, Title VII or the FMLA by any former employee, officer, agent, contractor, or vendor of BlueCrossBlueShield of Kansas Inc. [sic].

Response:
Defendant objects to the request as being overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff does not assert any claims of sex discrimination (under Title VII or otherwise), age discrimination (under ADEA or otherwise), disability discrimination (under the ADA or otherwise), or any other violation of Title VII. The time for amendment of the pleading has passed. Furthermore, response to the request would require defendant to violate binding contractual confidentiality.

n45 Defendant also notes that it has provided information regarding suits filed against it claiming violations of FMLA.

[*27]

**1. Overly Broad and Unduly Burdensome**

The court finds that Request No. 7 is overly broad and unduly burdensome on its face. Courts in the District of Kansas routinely find "a request . . . unduly burdensome on its face if it use[s] the omnibus term 'relating to' or 'regarding' with respect to a general category or group of documents." n46 Here, Request No. 7 seeks "[a]ny and all documents . . . *relating* to any legal action in which defendant has been involved" regarding the general category of all forms of employment discrimination. To answer this request would require defendant to "'engage in mental gymnastics to determine what information may or may not be remotely responsive.'" n47 Because the court can determine no reasonable guidance to define the extent to which either Request No. 7 is not objectionable, defendant's overly broad and unduly burdensome objections are sustained.

n46 *Aikens*, 217 F.R.D. at 537.

n47 *Aikens*, 217 F.R.D. at 538 (emphasis added).

[*28]

**2. Relevancy Objection**

The court incorporates its analysis of the similarly worded Interrogatory No. 10 here and sustains defendant's relevancy objections as to Request Nos. 7 and 20. Just as plaintiff failed to demonstrate the relevancy of Interrogatory Nos. 10 (with the exception of that portion directed to discovery of claims regarding FMLA violations), so too plaintiff fails to meet her burden to prove the relevancy of Request Nos. 7 and 20.

To the extent that Request No. 20 seeks information regarding confidential settlement agreements involving FMLA claims, the court still finds Request No. 20 is not reasonably calculated to lead to the discovery of admissible evidence in this *case*. As discussed in *Direct T.V. v. Puccinelli*, n48 three potential standards exist regarding the discoverability of confidential settlement agreements. n49 In deference to the strong public policy encouraging settlement, some courts have required a party seeking disclosure of confidential settlement agreements to meet a heightened standard in order to discover information related to or contained in the requested settlement agreements. n50 Other courts, including courts in the District [*29] of Kansas, have refused to apply such a heightened standard. Rather, these courts apply only the general Fed. R. Civ. P. 26 standard, requiring the party opposing the discovery request to demonstrate that it is not relevant to a claim or defense or not reasonably calculated to lead to the discovery of admissible evidence. n51 Still other courts adopt a compromise approach, requiring the party seeking discovery to demonstrate the relevance of the request. n52 The court in *Direct T.V.* determined that it need not choose which standard to follow because under any standard the production of confidential settlement agreements was warranted. n53

n48 224 F.R.D. 677, 686-87 (D. Kan. 2004)

n49 *Id.*

n50 *Id.* (citing *City of Wichita v. Aero Holdings, Inc.*, 192 F.R.D. 300, 302 at n.1 (rejecting the requirement of a higher burden for parties seeking to discovery evidence related to settlement negotiations)).

n51 *Direct T.V.*, 224 F.R.D. at 686.

n52 *Id.*

n53 *Id.* at 687.

[*30]

Defendant argues, and the court agrees, that the present case is distinguishable from *Direct T.V.* n54 In *Direct T.V.* defendants sought various settlement agreements between the plaintiff and persons who would be witnesses in the case. n55 Here, plaintiff seeks settlement agreements between defendant and persons who have no interest in this proceeding.

n54 Response (Doc. 48) at p. 22.

n55 *Direct T.V.*, 224 F.R.D. at 686-87.

Moreover, even under the general requirement of Rule 26, the least stringent standard, Request No. 20 is not reasonably calculated to lead to the discovery of admissible evidence regarding plaintiff's claims or defendant's defenses. Defendant argues that the settlement agreements, even those pertaining to the FMLA, are not relevant n56 and the court agrees. Interrogatory No. 8 gives plaintiff the names of BCBSKS employees who were terminated or otherwise disciplined for violating defendant's FMLA policy and documents evidencing such termination or discipline. [*31] This would include those who reached confidential settlement agreements with defendant. In light of this grant, the court can find no discernable reason as to why the confidential settlement agreements *themselves* would be relevant to plaintiff's claim. n57 Therefore, the court sustains defendant's relevancy objection.

n56 Response (Doc. 48) at p. 21-22.

n57 *See Sonnino v. University of Kansas Hospital Auth.*, 2004 U.S. Dist. LEXIS 6220 at 6-9 (D. Kan. April 8, 2004)(finding relevant an interrogatory requesting plaintiff to describe her allegations of discrimination in a previous and separate EEOC charge even though plaintiff had reached a confidential settlement in that case). In *Sonnino* the defendant never sought the confidential settlement agreement itself. *See id.*

**C. Request No. 8.**

Memorandum of any interviews, meeting notes, or conversation with Michele Moss from any time from her initial interview to period of termination.

Response: Defendant objects to [*32] the request as being vague, ambiguous, overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence. Defendant is unable to ascertain the scope of the request. It is unclear whether plaintiff and defendant's managers or supervisors, or if the request is intended to be broader. As written, the request conceivably calls for production of confidential and proprietary information, including documents concerning plaintiff's telephonic discussions with health care providers in defendant's network. If the request is limited to conversation with defendant's supervisors and managers, it is still overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence, as it would require production of documents that are completely unrelated to the claims plaintiff asserts herein.

**1. Relevancy Objection**

Defendant makes no showing in support of these

boilerplate objections. Apart from defendant's conjecture that the request conceivably calls for production of confidential and proprietary information there is absolutely no indication the defendant made any attempt to ascertain whether any documents existed at all. [*33] The court finds that Request No. 8 appears relevant on its face as it deals with memorandum and notes of interviews, meetings or conversations with Michele Moss which could include relevant evidence as to plaintiff's FMLA claims. Having found Request No. 8 facially relevant and because defendant offers no argument to the contrary, n58 the court overrules defendant's relevancy objection.

n58 *Gen. Elec. Capital Corp. v. Lear Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2004).

**2. Overly Broad and Unduly Burdensome**

Defendant has also failed to support its overly broad and unduly burdensome objection with "facts justifying their objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome." n59 Moreover, the court finds that Request No. 8 is not overly broad or unduly burdensome on its face. Defendant would likely only have to search the files of supervisors and managers who kept notes of any interviews, meetings, or conversation with plaintiff. [*34] Thus, the court overrules defendant's breadth and burden objections.

n59 *Horizon Holdings Inc. v. Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D. Kan. 2002) (citing *Snowden v. Connaught Lab., Inc.*, 137 F.R.D. 325, 332 (D. Kan. 1991)).

**3. Vague and Ambiguous Objection**

As the party objecting to discovery as vague or ambiguous, defendant has the burden to show such vagueness or ambiguity. n60 In doing so, the defendant must show that more tools beyond mere reason and common sense are necessary "to attribute ordinary definitions to terms and phrases utilized." n61 The court finds that defendant has failed to make such a showing. As plaintiff notes, the request asks for "notes from any meeting or interview with Michele Moss, not notes or memorandum that Michele Moss prepared." n62 Thus, the court overrules defendant's objection.

n60 *W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2403, 2002 U.S. Dist. LEXIS 1004 at *12 (D. Kan. Jan. 21, 2002) (citing *McCoo v. Denny's Inc.*, 192 F.R.D. 675, 694 (D. Kan. Apr. 18, 2000)).

[*35]

n61 *Id.*

n62 Memorandum in Support (Doc. 30) at p. 16.

**4. Privilege Objection**

Defendant raises, but fails to explain, its confidentiality and proprietary objection. Confidentiality of documents "does not equate to privilege." n63 "As such, information is not shielded from discovery on the sole basis that such information is confidential." n64 The parties have a jointly filed protective order and defendant makes no argument as to why such protective order would prove ineffective here. n65 The court overrules defendant's objection as to privilege as it is unsupported.

n63 *Williams v. Board of County Comm'rs*, 2000 U.S. Dist. LEXIS 8986, at *16 (D. Kan. June 21, 2000).

n64 *Id. See also DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 689-90 (D. Kan. 2004).

n65 Moreover, in the present motion, plaintiff notes that "[i]f the notes or memos [sought in Request No. 8] contain proprietary information, then obviously they should be withheld and noted in the privilege log." Memorandum in Support (Doc. 30) at p. 16.

[*36]

Having overruled defendant's objections, the court

directs defendant to produce the documents responsive to Request No. 8.

**D. Request Nos. 13 and 14.**

Plaintiff's Request Nos. 13 and 14 seek "[a]ny complaints by any employee or any other person employed by BCBSKS in that anyway [sic] relate to Cathy Holmes [No. 13] or Tonya Fuller [No. 14].

Defendant responds:

> Defendant objects to the request as being overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant also objects that the request is vague and ambiguous, as defendant is unable to ascertain what the difference is between "any employee" and "any other person employed at BCBSKS." The request is so broadly written as to encompass situations completely unrelated to the claims plaintiff asserts herein. Subject to and without waiving its objection, defendant state that there has not been any complaint that [Cathy Holmes or Tonya Fuller] individually violated the FMLA.

**1. Relevancy Objection**

Aside from simply listing these boilerplate objections, defendant makes no argument in their support. The court finds that Request Nos. 13 and [*37] 14 appear relevant. As plaintiff's direct supervisor, Ms. Holmes received e-mail communications from plaintiff regarding her illness, and appears to have had significant contact with plaintiff. n66 Ms. Fuller appears to have a significant role in the creation and enforcement of the defendant's FMLA policies. Discovery of any other complaints filed against Ms. Holmes or Ms. Fuller could demonstrate that BCBSKS did not universally enforce the BCBSKS "call in" or FMLA policies. Having found Request Nos. 13 and 14 facially relevant and considering that defendant has failed to prove otherwise, n67 the court overrules defendant's relevancy objection.

n66 *Id.* at 17.

n67 *Gen. Elec. Capital Corp. v. Lear Corp., 215 F.R.D. 637, 640 (D. Kan. 2004).*

**2. Overly Broad and Unduly Burdensome**

As to defendant's overly broad and unduly burdensome objections, defendant has failed to demonstrate their support with "facts justifying their objection by demonstrating that the time or expense involved [*38] in responding to requested discovery is unduly burdensome." n68 It would appear defendant would merely have to interview these two individuals and their supervisors to ascertain whether any written complaints exist. There is no indication that such a task would be unduly burdensome. Moreover, the court finds that Request Nos. 13 and 14 are not overly broad or unduly burdensome on their face, and overrules defendant's objection.

n68 *Horizon Holdings Inc. v. Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D. Kan. 2002) (citing *Snowden v. Connaught Lab., Inc.*, 137 F.R.D. 325, 332 (D. Kan. 1991)).

**3. Vague and Ambiguous Objection**

Defendant has also failed to meet its burden of showing vagueness or ambiguity. n69 Defendant must show that more tools beyond mere reason and common sense are necessary "to attribute ordinary definitions to terms and phrases utilized." n70 The court finds that defendant has failed to make such a showing.

n69 *W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2403, 2002 U.S. Dist. LEXIS 1004 at *12 (D. Kan. Jan. 21, 2002) (citing *McCoo v. Denny's Inc.*, 192 F.R.D. 675, 694 (D. Kan. Apr. 18, 2000)).

[*39]

n70 *Id.*

Having overruled defendant's objections, the court grants plaintiff's motion to compel defendant to produce documents responsive to Request Nos. 13 and 14.

**E. Request Nos. 15, 16, 17, and 18.**

Request for Production No. 15 through 18 seek "the complete personnel file or any file kept by BCBSKS relating to" Cathy Holmes, Tonya Fuller, Fred Boston, and Andrea Williams.

As to each request, defendant responded:

> Defendant objects to the request as being overly broad, unduly burdensome, [and] not reasonably calculated to lead to the discovery of admissible evidence. Most of the information contained in the personnel file of [the referenced employee] is irrelevant and immaterial to the issues presented in this lawsuit, and production of such information would unnecessarily violate [the employee's] privacy.

**1. D. Kan. Rule 37.2 Objection**

Defendant also argues that plaintiff has failed to meet the requirements of Kan. Rule 37.2. Prior to filing a motion to compel. D. Kan. Rule 37.2 requires the moving party to make a "reasonable effort to confer" with the other [*40] party.

Here, the court finds that plaintiff's counsel "compared views, consulted, and deliberated" about these requests with defense counsel as required by Rule 37.2. At the conclusion of this deliberation, plaintiff's counsel chose to maintain his position that a privilege log or the parties' protective order could negate any privacy concerns regarding these requests. n71 While defense counsel sought *further* discussion as to how these requests could be narrowed n72, the commitment of plaintiff's counsel to his position, and decision to file the present motion, did not violate Rule 37.2.

n71 *Id.*

n72 As to these requests, defendant asked plaintiff if "there [is] any particular information that you believe would be relevant, [that] would not be so intrusive." Memorandum in Support (Exhibit G). "Can we come up with some reasonable limits that would give you information that is potentially relevant, but also takes into consideration our concerns?" *Id.* (Exhibit H).

**2. Relevancy of Personnel [*41] Files**

"[M]erely because a person may be called as a witness at trial does not justify disclosure of his/her personnel file." n73 However, "[g]enerally an individual's personnel file is relevant and/or reasonably calculated to lead to the discovery of admissible evidence, and therefore discoverable, if the individual is alleged to have engaged in the *retaliation* or discrimination at issue or to have played an important role in the decision or incident that gives rise to the law suit." n74 Courts in the District of Kansas have apply this rule to in employment discrimination n75 and civil rights cases n76, but have also applied it under other circumstances. n77

n73 *Williams v. Board of County Comm'rs,* No. 98-2485, 2000 U.S. Dist. LEXIS 8986, *13 (D. Kan. June 21, 2000).

n74 *Oglesby v. Hy-Vee, Inc.,* No. 04-2440, 2005 U.S. Dist. LEXIS 6456 at * 2 (D. Kan. April 13, 2005)(emphasis added).

n75 *See e.g., EEOC v. Kansas City S. Ry.,* No. 99-2512, 2000 U.S. Dist. LEXIS 21806 at *3 (D. Kan. October 2, 2000); *Daneshvar v. Graphic Tehnology, Inc.,* No. 97-2304, 1998 U.S. Dist. LEXIS 16446 at *5 (D. Kan. October 9, 1998); *Fox-Martin v. H.J. Heinz Operations,* No. 02-4121, 2003 U.S. Dist. LEXIS 23571 at *2-3 (D. Kan. December 19, 2003) ("The court has on numerous occasions ruled on the ability to discovery personnel files in employment cases arising under Title VII where retaliation and discrimination are alleged.").

[*42]

n76 *See e.g., Williams,* 2000 U.S. Dist. LEXIS 8986 at *13.

n77 *See e.g., Barnes v. Akal Sec., Inc.,* No. 04-1350, 2006 U.S. Dist. LEXIS 59362 at *16 (D. Kan. August 21, 2006) (finding in a case alleging violations of the Fair Labor Standard Act that the

personnel files of those who were "directly or indirectly involved in the decision to deny Plaintiffs proper overtime pay and to terminate [plaintiffs]" were relevant).

Here, plaintiff has alleged FMLA interference and retaliation. The court finds these personnel files are of those who are alleged to have been involved either directly or indirectly in the "incident that gives rise to the suit" i.e., the decision to terminate plaintiff n78 and are relevant and discoverable. n79

n78 Cathy Holmes was plaintiff's direct supervisor. Tonya Fuller helped create and enforce BCBSKS' FMLA policy. Fred Boston is the director of professional relations for BCBSKS and has been identified by defendant as having knowledge of plaintiff's firing. Andrea Williams is an EEO Assistant and has direct knowledge as to plaintiff's FMLA usage. *See* Memorandum in Support (Doc. 30) at pp. 19-21.

[*43]

n79 Defendant readily acknowledges that *some* information contained in these personnel files could contain relevant evidence. *See* Memorandum in Support (Doc. 30)(Exhibit G)

**3. Defendant's Other Objections**

The court further overrules defendant's other objections as unsubstantiated. These requests are not overly broad on their face and defendant has failed to otherwise support its overly broad and unduly burdensome objections. Moreover, confidentiality of documents "does not equate to privilege." n80 "As such, information is not shielded from discovery on the sole basis that such information is confidential." n81 Plaintiff's following of the precautions outlined in the parties' joint protective order n82 should resolve defendant's privacy concerns. Consequently, the court grants plaintiff's motion to compel Request for Production Nos. 15, 16, 17, and 18.

n80 *Williams v. Board of County Comm'rs*, 2000 U.S. Dist. LEXIS 8986, at *16 (D. Kan. June 21, 2000).

n81 *Id. See also DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 689-90 (D. Kan. 2004).

[*44]

n82 *See* Protective Order (Doc. 13).

**III. Sanctions**

Under Fed. R. Civ. P. 37(a)(4)(C) when a court grants in part and denies in part a motion to compel, the court can "apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." Whether to impose sanctions lies within the court's discretion. n83 The court "must consider on a case-by-case basis whether the party's failure was substantially justified or whether other circumstances make the imposition of sanctions inappropriate." n84 In deciding whether to grant sanctions based on Rule 37(a)(4)(C), the court in *Mackey v. IBP, Inc.*, found that "[j]ustice requires that each party be responsible for its own costs and expenses incurred upon the motion [to compel]" because "[b]oth parties took legitimate positions on the motion [to compel]." n85

n83 *Barnes v. Akal Sec. Inc.*, No. 04-1350, 2005 U.S. Dist. LEXIS 33262, at *21 (D. Kan. December 9, 2005)(citing *Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)).

[*45]

n84 *Id.* (citing *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 646 (D. Kan. 1999)).

n85 *Mackey v. IBP Inc.*, 167 F.R.D. 186, 207 (D. Kan. 1996). *See also Lawrence-Leiter & Co. v. Paulson*, No. 96-2535, 1997 U.S. Dist. LEXIS 9817, at *7 (D. Kan. June 23, 1997)(concluding that because "the parties took legitimate positions on the motion [to compel] . . . sanctions are not

justified.").

Here, the court believes it appropriate and just for plaintiff and defendant to bear their own expenses and fees incurred in connection with the present motion because both parties took legitimate positions on the motion to compel.

Accordingly,

**IT IS THEREFORE ORDERED** that plaintiff's motion to compel (Doc. 29) is hereby granted in part and denied in part.

**IT IS FURTHER ORDERED** that by **April 23, 2007,** defendant shall respond to Interrogatory No. 8 to the extent it seeks information regarding only those employees who have been terminated or disciplined in writing for violating BCBSKS' FMLA policy. By **April 23, 2007,** defendant shall respond to [*46] Interrogatory No. 9 to the extent it seeks only *documented* instances of employee termination for attendance within the last five years. By **April 23, 2007,** defendant shall respond to Interrogatory No. 10 to the extent is seeks information regarding lawsuits, complaints, and administrative charges related to alleged violations of the FMLA by the defendant.

**IT IS FURTHER ORDERED** that by **April 23, 2007** defendant shall produce the documents responsive to Request Nos. 8, and 13-18 as set forth above.

**IT IS FURTHER ORDERED** that the parties' scheduling order (Doc. 15) should be amended as follows. All discovery is to be completed by **May 31, 2007.** The parties' dispositive motion deadline is extended to **July 9, 2007.** The parties' Final Pretrial Conference is rescheduled for **June 20, 2007 at 9:30 a.m.** The parties' proposed pretrial order is due in the undersigned's chambers by **June 13, 2007.** All applicable deadlines, settings, and specifications contained in the previous Scheduling Order entered in this case shall remain in effect except to the extent specifically addressed herein. This amended scheduling order shall not be modified except [*47] by leave of court upon a showing of good cause.

**IT IS SO ORDERED.**

Dated this 2 day of April, 2007, at Topeka, Kansas

s/ K. Gary Sebelius

U.S. Magistrate Judge

LEXSEE 2006 U.S. DIST. LEXIS 69051

**SHIRLEY WILLIAMS, et al., Plaintiffs, v. SPRINT/UNITED MANAGEMENT COMPANY, Defendant.**

**CIVIL ACTION No. 03-2200-JWL-DJW**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**

**2006 U.S. Dist. LEXIS 69051**

**September 25, 2006, Decided**
**September 25, 2006, Filed**

**SUBSEQUENT HISTORY:** Motion granted by, in part, Motion denied by, in part Williams v. Sprint/United Mgmt. Co., 238 F.R.D. 633, 2006 U.S. Dist. LEXIS 81574 (D. Kan., Nov. 3, 2006)

**PRIOR HISTORY:** Williams v. Sprint/United Mgmt. Co., 2006 U.S. Dist. LEXIS 65485 (D. Kan., Sept. 13, 2006)

**JUDGES:** [*1] David J. Waxse, United States Magistrate Judge.

**OPINION BY:** David J. Waxse

**OPINION:**

**MEMORANDUM AND ORDER**

Plaintiff Shirley Williams filed this suit on behalf of herself and others similarly situated, asserting that her age was a determining factor in Defendant's decision to terminate her employment during a reduction-in-force (RIF). This case has been provisionally certified as a collective action pursuant to 29 U.S.C. § 216(b) and the parties are presently engaged in discovery concerning the merits of Plaintiffs' pattern and practice allegations. This matter is presently before the Court on Plaintiffs' Motion to Compel Responses to Plaintiffs' Eighth and Ninth Requests for Production of Documents (doc. 3652). For the reasons set forth below, the motion is granted in part and denied in part.

**I. History of the Discovery Dispute**

**A. Plaintiffs' Eighth Request for Production of Documents**

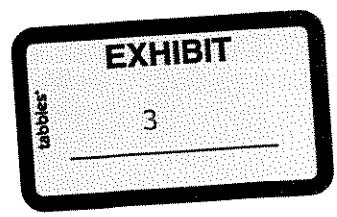
Relevant to this motion, Plaintiffs served their Eighth Request for Production of Documents Directed to Defendant on March 4, 2005. n1 Defendant served its responses and objections to Plaintiffs' Eighth Request for Production of Documents on April 21, 2005. n2 At [*2] the May 19, 2005 discovery conference, counsel for Plaintiffs advised the Court that he sent Defendant a golden rule letter with respect to Plaintiffs' Eighth Requests on May 11, 2005. n3 Plaintiffs' counsel reported to the Court that the parties had insufficient time to address Defendant's objections to Plaintiffs' Eighth Requests, but planned on discussing them in the near future. The parties proposed additional briefing on Defendant's objections to Plaintiffs' Seventh Interrogatories and Eighth Requests. This additional briefing was submitted to the Court on May 26, 2005, and then supplemented on June 1 and 2, 2005.

n1 *See* Certificate of Service (doc. 2737).

n2 *See* Certificate of Service (doc. 2822).

n3 *See* May 19, 2005 Transcript (doc. 2915) at p. 39.

At the June 6, 2005 discovery conference, the Court addressed Plaintiffs' Eighth Request Nos. 28 and 29. n4 It sustained Defendant's overly broad objections to both requests, sustained Defendant's objection to producing the contracts requested [*3] by No. 28, and overruled Defendant's relevancy objection to Request No. 29. After ruling on these objections, the Court ordered Defendant



to provide Plaintiffs with certain information.

n4 *See* June 9, 2005 Transcript at p. 55-56, and June 16, 2005 Order (doc. 2953) P 4-5.

The parties continued to report the status of their conferring efforts on the remaining unresolved Eighth Requests during discovery conferences with the Court on August 2, 2005. At the August 18, 2005 discovery conference, the Court set a September 1, 2005 deadline for the parties to advise the Court whether they had completed their conferring process with regard to Plaintiffs' Eighth Requests. n5 Plaintiffs updated the Court with the parties' conferring efforts on Plaintiffs' Eighth Requests at subsequent discovery conferences with the Court on September 1, September 19, October 6, October 20, November 17, December 15, 2005, and January 5, 2006.

n5 *See* August 19, 2005 Order (doc. 3174).

[*4]

At the January 19, 2006 discovery conference, Plaintiffs requested that they be allowed to February 28, 2006 to file any motions to compel with regard to all documents and discovery responses of Defendant from June 2005 until that time. The Court granted Plaintiffs' request for an extension of time to February 28, 2006 to file their motion to compel. n6

n6 *See* Order extending Plaintiffs' time to file motions to compel (doc. 3541) and Jan. 19, 2006 Transcript (doc. 3546) at p. 85.

**B. Plaintiffs' Ninth Request for Production of Documents**

Plaintiffs served their Ninth Request for Production of Documents on Defendant on May 18, 2005. n7 After requesting and receiving an extension of time to respond, Defendant served its responses and objections to Plaintiffs' Ninth Request for Production of Documents on June 27, 2005. n8 On August 2, 2006, Plaintiffs reported in their listing of issues for the August 3, 2005 discovery conference that they had received Defendant's responses to Plaintiffs' Eighth Interrogatories [*5] and Ninth Requests for Production beginning on June 29, 2005, and a supplemental compact disk on July 1, 2005. Counsel for Plaintiffs advised the Court he sent Defendant a golden rule letter on August 1, 2005, and the parties were in the very early stages of the meet and confer process. Plaintiffs sought to discuss with the Court a timetable and process for ultimate resolution. At the August 3, 2005 discovery conference, the Court set an August 17, 2005 deadline for parties to complete their conferring on this issue. n9

n7 *See* Certificate of Service (doc. 2903).

n8 *See* Certificate of Service (doc. 2973).

n9 *See* Aug. 3, 2005 Transcript at p. 16-18.

At the next eight discovery conferences with the Court, held between August 18, 2005 and January 5, 2006, Plaintiffs updated the Court with the parties' progress, or lack thereof, as to their conferring efforts on Plaintiffs' Ninth Requests. At the January 19, 2006 discovery conference, Plaintiffs requested that they be allowed to February 28, 2006 to [*6] file any motions to compel with regard to all documents and discovery responses of Defendant from June 2005 until that time. The Court granted Plaintiffs' request for an extension of time to February 28, 2006 to file their motion to compel. n10

n10 *See* Order extending Plaintiffs' time to file motions to compel (doc. 3541) and Jan. 19, 2006 Transcript (doc. 3546) at p. 85.

**II. Duty to Confer**

Defendant urges the Court to deny Plaintiffs' Motion to Compel based on Plaintiffs' non-compliance with their duty to confer. Defendant claims that Plaintiffs filed the instant Motion to Compel with regard to the discovery requests without attempting to confer to resolve the issue extrajudicially, as required by Fed. R. Civ. P 37(a)(2)(A) and D. Kan. Rule 37.2.

Federal Rule of Civil Procedure 37 requires the movant to make a good faith attempt to resolve the

discovery dispute before filing a motion to compel discovery responses. [*7] The motion to compel must include a certification of the effort to resolve the dispute. n11

n11 *Id.*

In conjunction with Fed. R. Civ. P. 37, District of Kansas Rule 37.2 provides:

> The court will not entertain any motion to resolve a discovery dispute pursuant to Fed. R. Civ. P. 26 through 37, . . ., unless counsel for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion. Every certification required by Fed. R. Civ. P. 26(c) and 37 and this rule related to the efforts of the parties to resolve discovery or disclosure disputes shall describe with particularity the steps taken by all counsel to resolve the issues in dispute.
>
> A "reasonable effort to confer" means more than mailing or faxing a letter [*8] to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so. n12

n12 D. Kan. Rule 37.2 (2006).

When the dispute involves objections to requested discovery, parties do not satisfy the conference requirements simply by requesting or demanding compliance with the requested discovery. n13 The parties must make genuine efforts to resolve the dispute by determining precisely what the requesting party is actually seeking; what responsive documents or information the discovering party is reasonably capable of producing; and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention. n14

n13 *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999).

n14 *Id.*

[*9]

Plaintiffs contemporaneously filed their Certificate of Consultation in Compliance with Local Rule (doc. 3654) along with the instant Motion to Compel. Plaintiffs state in their Certificate of Consultation that upon receipt of Defendant's responses to Plaintiffs' Eighth and Ninth Requests for Production of Documents, counsel for Plaintiffs immediately communicated with counsel for Defendant regarding Defendant's refusal to provide complete responses to many of the requests. They further state that "[o]ver the course of the next several months, the parties exchanged correspondence, discussed the issues at various 'meet and confer' sessions and in telephone conferences. In spite of their best efforts, counsel for the parties were unable to resolve this discovery dispute without court involvement."

Defendant argues that Plaintiffs filed the present Motion to Compel in lieu of responding to Defendant's invitation to discuss the requests. Defendant claims most of Plaintiffs' discovery requests at issue were mentioned only in an August 1, 2005 letter and not spoken about until their appearance six months later in Plaintiffs' Motion to Compel, despite the fact that Plaintiffs' counsel [*10] acknowledged that additional discussion was required. Defendant claims it has produced documents pursuant to some of Plaintiffs' requests and that counsel for Plaintiffs refused to discuss the requests at meet and confer sessions, even though they were on the agenda. Defendant notes that Plaintiffs made a specific attempt to resolve a small minority of the requests in December 2005, but then failed to respond to Defendant's invitation to further discuss the matter.

Plaintiffs argue that they have satisfied their meet and confer obligations because they continually tried to discuss their discovery requests with Defendant and the only option following Defendant's repeated refusal to produce was to file the instant Motion to Compel.

The Court determines that Plaintiffs have satisfied their meet and confer obligations required by D. Kan. Rule 37.2 and Federal Rule of Civil Procedure 37. In addition to attending twice monthly status conferences

with the Court, counsel met every other week in meet and confer sessions to address their various discovery disputes. Defendant argues that Plaintiffs placed the requests at issue in the instant Motion to [*11] Compel on the agenda of their meet and confer sessions, but never addressed them in the sessions. Even if true, this does not dissuade the Court from its finding that Plaintiffs made reasonable efforts to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion. Furthermore, in light of the parties' history of bringing their discovery disputes to the Court for resolution, it is unlikely this motion would have been avoided even had counsel for the parties discussed at length every single disputed discovery request at the meet and confer sessions. The Court finds that Plaintiffs have sufficiently satisfied their duty to confer as set forth by Fed. R. Civ. P. 37 and D. Kan. Rule 37.2.

**III. Specific Discovery Requests at Issue**

**A. Plaintiffs' Eighth Request Nos. 20 and 28-29**

Plaintiffs move the Court for an order compelling Defendant to produce documents responsive to Plaintiffs' Eighth Request Nos. 20, 28-29. As Defendant correctly points out, the Court has already ruled on Plaintiffs' Eighth Request Nos. 28 and 29 in its June 16, 2005 Order (doc. 2953). In that Order, the Court sustained [*12] Defendant's overly broad objections to Plaintiffs' Eighth Request Nos. 28 and 29, sustained Defendant's objection to producing the contracts requested by No. 28, and overruled Defendant's relevancy objection to Request No. 29. The Court ordered Defendant to produce the following information responsive to Request Nos. 28 and 29: (1) the names of any employment agency, recruiter, headhunter, or executive job placement firm that it used; (2) a list of names of any employment agency, recruiter, headhunter, or executive job placement firm it used in lieu of having to produce the documents that would contain these names; and (3)any job descriptions that it provided to these employment agencies, recruiters, headhunters, executive job placement firms for any open position in any department within Sprint where any of the Class Member opt-ins and Plaintiffs had worked for the period October 1, 2001 through March 31, 2003.

As the Court determines it has previously ruled on Plaintiffs' Eighth Request Nos. 28 and 29, the Court need not rule on these requests again. Plaintiffs' Motion to Compel Defendant to produce documents responsive to Plaintiffs' Eighth Request Nos. 28 and 29 is denied.

With [*13] regard to Plaintiffs' Eighth Request No. 20, which seeks documentation of Defendant's After Action Review (or similar reviews) following the 2003 LINK ratings for its 2002 performance evaluations, the Court determines that it has not previously ruled on this particular request. Upon review, the Court notes that Defendant has failed to re-assert any of its objections to this request in its response in opposition to Plaintiffs' motion. Because Defendant fails to reassert and rely upon its objections in its response in opposition to Plaintiffs' motion, the Court deems Defendant's objections to this request abandoned. n15 Plaintiffs' Motion to Compel Defendant to produce documents responsive to Plaintiffs' Eighth Request No. 20 is granted. If it has not already done so, Defendant shall produce documents responsive to Plaintiffs' Eighth Request No. 20 **within thirty (30) days of the date of this Memorandum and Order.**

n15 When ruling upon a motion to compel, the Court will consider only those objections that have been (1) timely asserted, *and* (2) relied up in response to the motion to compel. *Sonnino v. University of Kan. Hosp. Auth.*, 221 F.R.D. 661, 670 (D. Kan. 2004); *Cotracom*, 189 F.R.D. at 662. Objections initially raised but not relied upon in response to the motion to compel will be deemed abandoned. *Sonnino*, 221 F.R.D. at 670.

[*14]

**B. Plaintiffs' Ninth Request Nos. 10, 12-14, 16, 40, 45-59, and 64-66**

Plaintiffs also request an order compelling Defendant to produce documents responsive to Plaintiffs' Ninth Request Nos. 10, 12-14, 16, 27-36, 40, 41-42, 45-59, 60-63, and 64-66. Defendant asserted objections to all of these requests in its discovery responses, but only reasserted its objections to Plaintiffs' Ninth Request Nos. 27-36, 41-42, and 60-63 in its response in opposition to Plaintiffs' Motion to Compel.

Because Defendant fails to reassert and rely upon its objections in its response in opposition to Plaintiffs' Motion to Compel as to Plaintiffs' Ninth Request Nos. 10, 12-14, 16, 40, 45-59, and 64-66, the Court deems Defendant's objections to these requests abandoned. n16 Plaintiffs' Motion to Compel Defendant to produce

documents responsive to Plaintiffs' Ninth Request Nos. 10, 12-14, 16, 40, 45-59, 64-66 is granted. If it has not already done so, Defendant shall produce documents responsive to Plaintiffs' Ninth Request Nos. 10, 12-14, 16, 40, 45-59, and 64-66 **within thirty (30) days of the date of this Memorandum and Order.**

n16 *See* Sonnino, 221 F.R.D. at 670 (objections initially raised but not relied upon in response to the motion to compel will be deemed abandoned).

[*15]

**C. Plaintiffs' Ninth Request Nos. 27-36**

Plaintiffs also seek to compel Defendant to produce documents responsive to Plaintiffs' Ninth Request Nos. 27-36, a series of requests seeking documents regarding Defendant's purchase, distribution, and use of a book titled, "Jack Straight From the Gut," authored by Jack Welch, former chief executive officer of General Electric. The requests also seek discovery regarding meetings and correspondence between Jack Welch and William T. Esrey, who was Defendant's chief executive officer from 1988 to March 2003. Specifically, Plaintiffs' Ninth Request Nos. 27-36 ask Defendant to produce the following:

> . any and all documents reflecting monies expended by Sprint for the purchase of any and all copies of the book "[Jack] Straight from the Gut," by Jack Welch (Ninth Request No. 27).
>
> . any and all documents containing the names of any employee(s) to whom Sprint, its agents, employees or representatives provided a copy of the book marked in Ron Focht's deposition as Ex. 1002 (Ninth Request No. 28)
>
> . any and all accounting records, receipts, or other documents showing any meal or other entertainment expense relating to Jack Welch [*16] or any function at which Jack Welch was entertained by any Sprint employee (Ninth Request No. 29)
>
> . any and all memos or directives from Sprint, its agents, employees or representatives disclaiming any aspect or portion of the book, "[Jack] Straight from the Gut," by Jack Welch. (Ninth Request No. 30)
>
> . any and all documents, including e-mails and information stored on-line in any form whatsoever, that mention Jack Welch's book, "[Jack] Straight from the Gut," and/or any portions thereof (Ninth Request No. 31)
>
> . all entries on Bill Esrey's computer and/or calendar, scheduler/planner, diary, log journal or other document that relate to or mention the name Jack Welch (Ninth Request No. 32)
>
> . any and all documents reflecting any and all communication, including but not limited to e-mails from supervisory, and/or other employees, quoting or making references to any principles or contents found within "[Jack] Straight from the Gut," by Jack Welch (*Ninth* Request No. 33)
>
> . all e-mails sent to or from Bill Esrey to Jack Welch, or vice versa, from January 1, 2000 through March 31, 2003 (Ninth Request No. 34)
>
> . any and all Sprint documents and/or records [*17] tha[t] mention the term "runway" (Ninth Request No. 35)
>
> . any and all documents purporting to define or explain the meaning of the term "runway" or any phrase that includes the word "runway" (Ninth Request No. 36)

Defendant objects to these requests on the basis they are not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects on the grounds that the requests seek documents that are not relevant to Plaintiffs' claim that Defendant engaged in a pattern and practice of age discrimination by terminating their employment during RIFs. Defendant also objects to the requests because they are not reasonably limited in

scope as to time by presumably seeking documents outside the time period relevant to this case, i.e., October 1, 2001 through March 31, 2003. Defendant further objects to some of the requests on the basis they seek information from third parties and information regarding employees of entities other than Defendant.

*1. Relevancy objections*

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant [*18] to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." n17 "Relevancy is broadly construed at the discovery stage of litigation and a request for discovery should be considered relevant if there is "any possibility" that the information sought may be relevant to the claim or defense of any party. n18 When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed. R. Civ. P 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad discovery. n19 Conversely, when relevancy is not readily apparent on the face of the request, the party seeking the discovery has the burden of showing the relevancy of the discovery request. n20

n17 Fed. R. Civ. P. 26(b)(1).

[*19]

n18 *Smith v. MCI Telecommunications Corp.*, 137 F.R.D. 25, 27 (D. Kan. 1991).

n19 *Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 672-673 (D. Kan. 2005).

n20 *Pulsecard, Inc. v. Discover Card Servs., Inc.*, 168 F.R.D. 295, 309 (D. Kan. 1996).

Applying these principles, the Court finds that the relevancy of Plaintiffs' Ninth Request Nos. 27-36 is not readily apparent on their face. Plaintiffs, as the party seeking the discovery, thus have the burden of showing the relevancy of these discovery requests.

Plaintiffs argue that these requests are relevant because they seek documentation of a meeting on Defendant's campus in the fall of 2001, shortly before Defendant's Alpha rating system was designed and implemented, where GE Chairman Jack Welch spoke about his book, "Jack Straight From the Gut." Plaintiffs assert that Mr. Welch discussed his business philosophies included in the book, one of which is a business philosophy they argue favors younger employees. Plaintiffs contend that Defendant adhered to this business philosophy. Plaintiffs argue [*20] in their motion that "it is well documented that the book espouses an ageist philosophy, and contains advice, for example, to seek and/or retain employees 'with a long runway,' and to eliminate the 'bottom 10%' of the workforce." n21 According to Plaintiffs, it is also documented that the chief executive officer of Sprint at the time of the RIFs, William Esrey, championed the philosophies of Welch, invited Welch to speak on the campus, and distributed copies of Welch's book. Plaintiffs allege that certain phrases from the book, including the "long runway" comment, were subsequently used by Defendant's management because documents produced by Defendant use the "runway" expression. Plaintiffs assert that their discovery requests are thus relevant in showing that an ageist environment not only existed but was encouraged by Defendant.

n21 Mem. in Supp. of Pls.' Mot. to Compel (doc. 3653), p. 7.

As the Court understands Plaintiffs' argument, their requests are relevant to show that, at the time of the RIFs, Defendant's [*21] top-level management promoted and encouraged the business philosophies set forth in the Jack Welch book, and one of those business philosophies favors younger employees. The promotion and encouragement of this allegedly ageist business philosophy by Defendant's top-level management supports Plaintiffs' claim that Defendant engaged in a pattern and practice age discrimination.

The Court agrees that Plaintiffs have generally shown why discovery into Defendant's adoption and promulgation of an allegedly ageist business philosophy, if true, might support their claim that Defendant engaged in a pattern and practice of age discrimination. Thus, the

Court finds that Plaintiffs have met their burden of showing relevancy. Although some of the requests may not be directly related to Plaintiffs' pattern and practice claim, the Courts' finding comports with the general policy that discovery should be considered relevant if there is "any possibility" that the information may be relevant to the claim or defense of any party. n22 Defendant's relevancy objections are therefore overruled.

n22 *MCI Telecomms. Corp.*, 137 F.R.D. at 27.

[*22]

*2. Overly broad objections*

Defendant also objects to Plaintiffs' Ninth Request Nos. 27-36 on the grounds the requests are overly broad. Specifically, Defendant contends that the requests are not reasonably limited in scope as to time by seeking documents outside the time relevant to this case, i.e. October 1, 2001 through March 31, 2003. Defendant further contends that the requests seek information from third parties other than Defendant, and information regarding employees of entities other than Defendant.

Fed. R. Civ. P. 34(b) provides that requests shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. Moreover, requests should be reasonably specific, allowing the respondent to readily identify what is wanted. n23 Courts may find requests overly broad when they are "couched in such broad language as to make arduous the task of deciding which of numerous documents may conceivably fall within [their] scope." n24 A party objecting to a discovery request on the basis of overbreadth must support its objection, unless the request appears overly broad on its [*23] face. n25

n23 *General Elec. Capital Corp. v. Lear Corp*, 215 F.R.D. 637, 641 (D. Kan. 2003).

n24 *Id.* (citing *Audiotext Commc'ns v. U.S. Telecom, Inc.*, 1995 U.S. Dist. LEXIS 545, No. 94-2395-GTV, 1995 WL 18759, at *1 (D. Kan. Jan.17, 1995)).

n25 *Cory*, 225 F.R.D. at 672.

The Court has reviewed Plaintiffs' Ninth Request Nos. 27-36 and finds that these requests are overly broad on their face. First, the requests are overly broad in temporal scope because they are not limited to any reasonable time period. None of the requests, except Request No. 34, contains any temporal limitation. The Court realizes that the timing of the publication of the book in 2001 does inherently place a beginning time restriction on a few of the requests. However, none of these requests include an end time restriction. Moreover, not all of the requests have such an inherent limitation, such as Request No. 32, which seeks "all entries on Bill Esrey's computer and/or calendar, scheduler, planner, diary, [*24] log journal or other documents that relate to or mention the name Jack Welch." Presumably, Plaintiffs are only interested in the dates Bill Esrey met with Jack Welch in the years immediately prior to and during the RIFs at issue. However, the request is not limited to that time frame. The Court therefore finds that Plaintiffs' Request Nos. 27-33, and 35-36 are overly broad in temporal scope because they do not limit the requests to any reasonable time period.

Second, many of the requests are overly broad on their face because they apply to every employee of Defendant. Specifically, Request Nos. 28, 30, 31, 33, and 35-36 all lack any limitation as to the employees who would fall within the scope of the requests. These requests are unlimited and would require Defendant to ask every employee whether he or she had documents responsive to the requests. Perhaps if these requests were limited to management-level employees or employees responsible for making the RIF decisions, or even limited in geographic scope or appropriate business unit or department, would the Court not find them so overly broad. Without any such limitation, the Court finds Plaintiffs' Request Nos. 28, 30, 31, 33, and [*25] 35-36 to be overly broad.

Third, some of the requests fail to even limit the information sought to the business philosophy described in the Welch book that Plaintiffs allege favors younger employees. For example, Ninth Request No. 31 seeks "any and all documents, including e-mails and information stored on-line in any form whatsoever, that mention Jack Welch's book, '[Jack] Straight from the Gut,' and/or any portions thereof." This request is overly broad in that it asks for all documents that mention the book in any context and is not limited to the allegedly ageist philosophy. Ninth Request Nos. 35 and 36

respectively seek "any and all Sprint documents and/or records tha[t] mention the term 'runway'" and "any and all documents purporting to define or explain the meaning of the term 'runway' or any phrase that includes the word 'runway'." These requests are overly broad in that they do not limit the term "runway" to the context used in the Jack Welch book. Ninth Request No. 34 seeks "all e-mails sent to or from Bill Esrey to Jack Welch, or vice versa, . . . ." This request also fails to limit its scope to the business philosophy described in the Welch book that Plaintiffs allege [*26] favors younger employees. Because these requests fail to limit their scope to the business philosophy described in the Welch book that Plaintiffs allege favors younger employees, the Court finds that Plaintiffs' Request Nos. 31 and 34-36 are overly broad.

In summary, the Court determines that Plaintiffs' Ninth Request Nos. 27-36 are overly broad on their face. Here, the Court will not compel further response from Defendant because inadequate guidance exists to determine the proper scope of the requests. n26 Defendant's overly broad objections to these discovery requests are sustained. Plaintiffs' Motion to Compel Defendant to produce documents responsive to Plaintiffs' Ninth Request Nos. 27-36 is denied.

n26 *See Cotracom*, 189 F.R.D. at 666 (the court will not compel further response when inadequate guidance exists to determine the proper scope of a discovery request).

**D. Plaintiffs' Ninth Request Nos. 41-42**

Plaintiffs' Ninth Request Nos. 41-42 seek production of "documents from, and statements [*27] ascribed to, Gary Forsee [Sprint's Chief Executive Officer] commenting on Sprint's Performance Management System and/or Sprint's Employee Evaluation system" and "documents from any source, announcing or concerning any changes to 'Alpha' LINK after Gary Forsee re-joined Sprint in April 2003."

Defendant objects to these requests on the grounds they are not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects on grounds that the documents are not relevant to Plaintiffs' claim that it engaged in a pattern and practice of age discrimination by terminating their employment during RIFs during the relevant time period relevant to this case, i.e., October 1, 2001 through March 31, 2003. Defendant argues that its evaluation system was not age discriminatory, but even if it was, comments about or changes made to the system after the relevant time frame of Plaintiffs' claim cannot be reasonably calculated to discovery of evidence of pattern and practice of age discrimination.

Plaintiffs disagree, contending that their requests seeking information on comments made by Defendant's chief executive officer regarding its evaluation system are relevant [*28] because this evaluation system is one of the means by which Plaintiffs claim Defendant engaged in a pattern and practice of age discrimination. They maintain they are entitled to discover whether Mr. Forsee either criticized or embraced the system, or whether changes were made in response to suggestions or criticisms of Mr. Forsee.

The Court finds that these requests, which seek statements ascribed to, Defendant's new chief executive officer commenting on the company's Performance Management System and/or Employee Evaluation system and documents announcing or concerning any changes to Alpha LINK after he re-joined Sprint in April 2003 appear to seek discovery relevant to Plaintiffs' claim that Defendant engaged in a pattern and practice of age discrimination. Plaintiffs allege that Defendant utilized its Performance Management System and/or Employee Evaluation system in order to effectuate its policy of discriminating against older employees. Discovery into criticism or endorsement of Defendant's evaluation system by its new chief executive officer would thus be relevant toward establishing whether Defendant's evaluation system had been internally criticized as age discriminatory [*29] and changed as a result of this criticism. Defendant's relevancy objections to these requests are therefore overruled. Plaintiffs' Motion to Compel Defendant to produce documents responsive to their Ninth Request Nos. 41 and 42 is granted. Defendant shall produce documents responsive to Plaintiffs' Ninth Request Nos. 41 and 42 **within thirty (30) days of the date of this Memorandum and Order.**

**E. Plaintiffs' Ninth Request Nos. 60-63**

Plaintiff's Ninth Request Nos. 60-63 generally seek documents relating to Defendant's use of contract employees, and whether Sprint issued a new identification badge to employees who were terminated

as part of the RIFs, but who were subsequently rehired as contract employees. Specifically, Plaintiffs' Ninth Request Nos. 60 - 63 asks Defendant to produce the following:

> . any and all databases containing information on the specific employees who have worked at Sprint at any time between June 1, 2001 to March 31, 2003, who were "re-badged" and otherwise employed by another firm (such as IBM) while continuing to work at Sprint. This request will include databases maintained by any Sprint department (such as Security or Facilities or [*30] IT department used in part to determine badge numbers and/or who has access to Sprint facilities and/or Sprint's computer systems (Request No. 60)
>
> . any and all documents and databases which would provide the identity by name, job title, job description, department, job code, cost center, mail stop, region code, department code, supervisor, supervisory no., and date of birth, of all Sprint employees who were "re-badged" at any time during the period January 1, 2001 through December 31, 2003 (Request No. 60a)
>
> . any database, list or other document which refers to or reflects the companies that have provided contract employees to Sprint from 2001 to date, including documents that describe the number and/or identity of employees provided (Request No. 61)
>
> . any and all documents relating to and/or consisting of any contract with IBM and/or third-party vendors for the "re-badging" of Sprint employees, during the period January 1, 2001 through December 31, 2003 (Request No. 62)
>
> . any and all documents and databases that would show employees who were hired as a Sprint employee and/or contractor, and/or "re-badged" employee for any position within a business unit from which [*31] any Class member was terminated, and in which the rehire took place within one (1) year of such Class member's termination (Request No. 63)

Defendant objected that these discovery requests are unnecessarily cumulative and duplicative with prior discovery, improperly seek individualized discovery, seek information outside the relevant time period, are overly broad, are not reasonably particular, and are not reasonably calculated to lead to the discovery of admissible evidence.

*1. Relevancy objections*

Defendant argues in opposition to Plaintiffs' motion that Plaintiffs' Ninth Request Nos. 60-63 are not reasonably calculated to lead to the discovery of admissible evidence. Defendant states these requests amount to a misguided fishing expedition based on Plaintiffs' unfounded assumption that Defendant discriminated against its older workers by terminating its younger employees, and then secretly re-hiring the younger workers "under the guise" of third-party contracts with other companies.

Plaintiffs argue that their Ninth Request Nos. 60-63 are relevant to their claims that Defendant engaged in a pattern and practice of age discrimination because this is one of the alleged methods [*32] by which Defendant terminated older employees and kept or rehired younger employees. Upon consideration of Plaintiffs' arguments presented, the Court finds that Plaintiffs have established the relevancy of these requests to their claim Defendant engaged in a pattern and practice of age discrimination. Defendant's relevancy objections to these requests are overruled.

*2. Other objections*

Defendant further objects to Plaintiffs' Ninth Request Nos. 60-63 on the grounds the requests improperly seek individualized discovery, are duplicative of other discovery, seek information outside the relevant time period, are overly broad, and are not reasonably particular. In addition, Defendant states it does not maintain most of the requested materials as Plaintiffs have specifically requested them.

The Court finds that Defendant has not sufficiently

supported any of its remaining objections to these discovery requests, including how these requests improperly seek individualized discovery, are duplicative of other discovery, seek information outside the relevant time period, are overly broad, and are not reasonably particular. The Court therefore overrules these objections.

Defendant also [*33] states it does not maintain most of the requested materials as Plaintiffs have specifically requested them. To the extent that Defendant is claiming that it does not have the requested documents in its possession, custody, or control, Rule 34(a) provides that Defendant is only required to produce documents that are within its "possession, custody or control." n27

> n27 Fed. R. Civ. P. 34(a) (a party upon whom a request for production of document is served need only produce matters within the scope of 26(b) and which are within its "possession, custody or control").

Plaintiffs' Motion to Compel Defendant to produce documents responsive to their Ninth Request Nos. 60-63 is granted. If it has not already done so, Defendant shall produce documents within its possession, custody, or control and responsive to Plaintiffs' Ninth Request Nos. 60-63 **within thirty (30) days of the date of this Memorandum and Order.**

**IT IS THEREFORE ORDERED** that Plaintiffs' Motion to [*34] Compel Responses to Plaintiffs' Eighth and Ninth Requests for Production of Documents (doc. 3652) is granted in part and denied in part. Plaintiffs' Motion to Compel is granted as to Plaintiffs' Eighth Request Nos. 20, and Ninth Request Nos. 10, 12-14, 16, 40, 45-59, 64-66, 41-42 and 60-63. Plaintiffs' Motion to Compel is denied as to Plaintiffs' Eighth Request Nos. 28-29, and Ninth Request Nos. 27-36. If it has not already done so, Defendant shall produce documents responsive to Plaintiffs' Eighth Request No. 20, and Ninth Request Nos. 10, 12-14, 16, 40, 45-59, 64-66, 41-42, and 60-63 **within thirty (30) days of the date of this Memorandum and Order.**

**IT IS FURTHER ORDERED** the circumstances of this motion make an award of expenses unjust, and therefore each party is to bear their own expenses in relation to this motion.

**IT IS SO ORDERED.**

Dated in Kansas City, Kansas on this 25th day of September, 2006.

s/ David J. Waxse

United States Magistrate Judge

LEXSEE 2007 U.S. DIST. LEXIS 5144

**PERRY APSLEY, et al., Plaintiffs, v. THE BOEING COMPANY, THE ONEX CORPORATION, and SPIRIT AEROSYSTEMS, Defendants.**

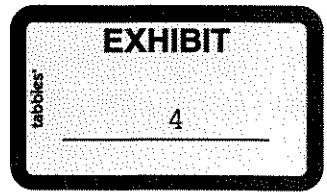
**Case No. 05-1368-MLB**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**

**2007 U.S. Dist. LEXIS 5144**

**January 17, 2007, Decided**

**COUNSEL:** [*1] For Perry Apsley, Individually and on behalf of those similarly situated, Bob Bailey, Individually and on behalf of those similarly situated, Jacob A. Bakk, Individually and on behalf of those similarly situated, Gary Ball, Individually and on behalf of those similarly situated, Peggy S Bell, Individually and on behalf of those similarly situated, Thomas Belton, Individually and on behalf of those similarly situated, Melonda Bircher, Individually and on behalf of those similarly situated, James Bowmaker, Individually and on behalf of those similarly situated, Jerry L. Bransteter, Individually and on behalf of those similarly situated, Michael E. Burgardt, Individually and on behalf of those similarly situated, Rocky R. Burris, Individually and on behalf of those similarly situated, Daniel D. Burrows, Individually and on behalf of those similarly situated, Henry F Butler, Individually and on behalf of those similarly situated, Betty Childers, Individually and on behalf of those similarly situated, David L. Clay, Individually and on behalf of those similarly situated, Larry E. Combs, Individually and on behalf of those similarly situated, Harvey J. Conyac, Individually and on behalf of [*2] those similarly situated, Loren W. Cox, Individually and on behalf of those similarly situated, Phyllis A Cox, Individually and on behalf of those similarly situated, Linda L. Dezarn, Individually and on behalf of those similarly situated, William D. Doshier, Individually and on behalf of those similarly situated, Throma A. Dyas, Individually and on behalf of those similarly situated, Alan S. Epperson, Individually and on behalf of those similarly situated, Lloyd C. Fansler, Individually and on behalf of those similarly situated, Jerald J. Gilbert, Individually and on behalf of those similarly situated, Richard Gotthard, Individually and on behalf of those similarly situated, Brian Groom, Individually and on behalf of those similarly situated, Denise A. Harris, Individually and on behalf of those similarly situated, Ron W. Hendershot, Individually and on behalf of those similarly situated, Olivia J Housley, Individually and on behalf of those similarly situated, Verna J. Houston, Individually and on behalf of those similarly situated, Larry W. James, Individually and on behalf of those similarly situated, Sharron N. James, Individually and on behalf of those similarly situated, Gary [*3] L Johnson, Individually and on behalf of those similarly situated, Melvyn J. Johnson, Individually and on behalf of those similarly situated, Donald R. Jones, Individually and on behalf of those similarly situated, Ralph O. Keener, Individually and on behalf of those similarly situated, Danny R. Kennedy, Individually and on behalf of those similarly situated, Melvin E. Kerns, Individually and on behalf of those similarly situated, Gordon B. Kinkead, Individually and on behalf of those similarly situated, Jimmy Le, Individually and on behalf of those similarly situated, Carlton D Lee, Individually and on behalf of those similarly situated, Stephen L. Linck, Individually and on behalf of those similarly situated, Freddy J. McColpin, Individually and on behalf of those similarly situated, Glennys M. Montgomery, Individually and on behalf of those similarly situated, Cathy J. Munsell, Individually and on behalf of those similarly situated, Jan W Murray, Individually and on behalf of those similarly situated, Huyen T. Nguyen, Individually and on behalf of those similarly situated, Luyen D. Nguyen, Individually and on behalf of those similarly situated, Kent W. Owen, Individually and on [*4] behalf of those similarly situated, Lowanda J. Patton, Individually and on behalf of those similarly situated, Paul D. Pete, Individually and on behalf of those



similarly situated, Brent L. Popp, Individually and on behalf of those similarly situated, James E. Porter, Individually and on behalf of those similarly situated, Jay E. Powell, Individually and on behalf of those similarly situated, Warren Pyles, Individually and on behalf of those similarly situated, Willard J. Ratchford, Individually and on behalf of those similarly situated, Veronica Rios, Individually and on behalf of those similarly situated, Richard D. Roeder, Individually and on behalf of those similarly situated, Darlene E. Rozar, Individually and on behalf of those similarly situated, Albert Schloetzer, Individually and on behalf of those similarly situated, William H. Setchell, Individually and on behalf of those similarly situated, James C. Sheppard, Individually and on behalf of those similarly situated, Debra L Smith, Individually and on behalf of those similarly situated, Sammy J. Smith, Individually and on behalf of those similarly situated, Sharon A. Southern, Individually and on behalf of those similarly [*5] situated, Linda C. Sparrar, Individually and on behalf of those similarly situated, Abel L. Vasquez, Individually and on behalf of those similarly situated, Henry F. Victor, Individually and on behalf of those similarly situated, James Walker, Individually and on behalf of those similarly situated, James R. Wallace, Individually and on behalf of those similarly situated, Carolyn Y. Wheaton, Individually and on behalf of those similarly situated, Sylvester Williams, II, Individually and on behalf of those similarly situated, Janet M. Wilson, Individually and on behalf of those similarly situated, Walter Woods, Individually and on behalf of those similarly situated, Betty R. Young, Individually and on behalf of those similarly situated, Vernon L Bentley, Individually and on behalf of those similarly situated, Redell Coleman, Individually and on behalf of those similarly situated, Charles D Elder, Individually and on behalf of those similarly situated, Chip Gilchrist, II, Individually and on behalf of those similarly situated, Janet S Hansen, Individually and on behalf of those similarly situated, Jerry L McKinney, Individually and on behalf of those similarly situated, Joseph E Schroeder, [*6] Individually and on behalf of those similarly situated, Steven M Schwind, Individually and on behalf of those similarly situated, Teddy F Sill, Individually and on behalf of those similarly situated, Charles Stark, Individually and on behalf of those similarly situated, Roy T Wells, Individually and on behalf of those similarly situated, Michael B Welsh, Individually and on behalf of those similarly situated, Charles L Bean, Jr, James Hammon, Allen C Hatcher, Mark McCurdy, Steven Ngo, Ba Pham, Donald E Titus, Jimmy Wallace, Barbra Odom, Frank Cash, Richard Wallin, Dale C Jayne, Jr, Plaintiffs: Lawrence W. Williamson, Jr., Monique K. Centeno, Uzo L. Ohaebosim, LEAD ATTORNEYS, Shores, Williamson & Ohaebosim, LLC, Wichita, KS.

For Boeing Company, The, Onex Corporation, The, Spirit Aerosystems, Defendants: Carolyn L. Matthews , Douglas L. Stanley, James M. Armstrong, Todd N. Tedesco, Trisha A. Thelen, LEAD ATTORNEYS, Foulston Siefkin LLP- Wichita, Wichita, KS.

**JUDGES:** KAREN M. HUMPHREYS, United States Magistrate Judge.

**OPINION BY:** KAREN M. HUMPHREYS

**OPINION:**

**MEMORANDUM AND ORDER**

This matter is before the court on plaintiffs' motion to compel defendants to answer discovery requests. (Doc. [*7] 97). For the reasons set forth below, the motion shall be GRANTED IN PART and DENIED IN PART.

**Background**

This lawsuit arises from Boeing's sale of its commercial airplane manufacturing facilities in (1) Wichita, Kansas; (2) Tulsa, Oklahoma; and (3) McAlester, Oklahoma. n1 Highly summarized, plaintiffs allege that, "as early as January 2002," Boeing engaged in a "common scheme" of discrimination against older workers when the company began efforts to sell its Wichita Division. Doc. 40, p. 35. Plaintiffs contend that Boeing "made several 'low-key' layoffs" of older workers in 2002 and 2003 to make a prospective purchase of its Wichita operations more attractive to buyers by reducing pension and health care costs. Doc. 40, p.35.

n1 The Wichita, Tulsa and McAlester facilities comprised Boeing's "Wichita Division." Boeing also has facilities for "military-related" operations in Wichita which were not sold and are not a part of this litigation. In the context of this opinion and the lawsuit, the terms "facilities" or "operations" refer to Boeing's commercial airplane manufacturing business.

[*8]

Boeing admits that in September 2003 a team of Boeing employees was formed to sell the Wichita Division. n2 Doc. 115, p. 4. In 2004 Boeing publicly announced its intention to sell its commercial facilities in Wichita and Oklahoma and eventually negotiated an Asset Purchase Agreement with defendant Onex, a Canadian corporation. As part of the transaction, Onex created a new business entity, Spirit AeroSystems Inc., to own and operate the Wichita and Oklahoma facilities. n3

n2 The project to offer these facilities for sale was known as "Project Lloyd."

n3 The original name of the new company was Mid-Western Aircraft System Inc. However, in July 2005 Mid-Western changed its name to Spirit AeroSystems Inc.

Spirit announced plans to continue operating the commercial manufacturing facilities. However, Boeing employees who wanted to continue their employment with Spirit were required to submit an application. After reviewing work records and interviewing Boeing managers, Spirit hired some, but not all, of the [*9] Boeing employees who sought to continue employment with Spirit. n4

n4 Plaintiffs allege that the "common scheme" of discrimination climaxed with major layoffs in May and June of 2005. Doc. 40, p. 35. Boeing denies plaintiffs' claims of discrimination and argues that *all* employees in the affected facilities were terminated by June 16, 2005, the effective date of the Asset Purchase Agreement. Spirit assumed operations on June 17 and the former Boeing employees who were rehired began working for Spirit that same day.

Plaintiffs seek to proceed as a class action and allege that Boeing and Onex engaged in unlawful age discrimination in the layoff and rehire process. Doc. 40, pp. 43-44. n5 Plaintiffs also contend that Boeing and Onex (1) intentionally interfered with their ERISA pension rights, (2) breached collective bargaining agreements, and (3) unlawfully retaliated against employees who had previously exercised protected employment rights. n6 Doc. 40, pp. 44-47. Additional facts and contentions are included [*10] in the analysis of the parties' discovery disputes.

n5 Plaintiffs allege that (1) Onex is the parent company of Spirit Aerospace [sic], (2) Spirit was "not properly capitalized and (3) Spirit and Onex share the same directors, officers and employees. Doc. 40, p. 32. Although not expressly alleged in the complaint, plaintiffs apparently seek to pierce the corporate veil between Onex and Spirit.

n6 Plaintiffs' claims that defendants violated (1) Title VII record keeping requirements by failing to maintain records and (2) other federal statutes by requiring employees to sign releases have been dismissed. Memorandum and Order, Doc. 139, filed December 18, 2006. Defendants' motion to dismiss plaintiffs' remaining ERISA claim has been denied. Id.

**Motion to Compel**

Plaintiffs move to compel (1) Boeing to answer five interrogatories and produce documents responsive to eleven production requests and (2) Spirit to produce documents responsive to twelve production requests. Doc. 97. Plaintiffs also [*11] ask the court to approve a temporal scope of discovery commencing January 1, 2000 and to rule on plaintiffs' email search protocol. Doc. 104. Defendants oppose the motion, arguing that the discovery requests (1) seek irrelevant information, (2) are overly broad and/or (3) unduly burdensome. Plaintiffs counter that the information requested is relevant and that defendants have failed to show that producing the information is unduly burdensome.

The standards concerning the scope of discovery are well established. Rule 26(b)(1) provides:

> **In General.** Parties may obtain discovery regarding *any matter, not privileged, that is relevant to the claim or defense of any party,* including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible

> things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. *All discovery is subject* [*12] *to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).* (Emphasis added).

The limitations in Rule 26(b)(2)(C)(i), (ii), and (iii) are:

> (I) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. n7

> n7 Rule 26(b)(2) was amended effective December 1, 2006 to address electronic discovery. The limitations described in parts (i), (ii), and (iii) remain unchanged.

Relevance, at the discovery stage, is broadly construed. Generally, "a request for discovery should [*13] be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." Sheldon v. Vermonty, 204 F.R.D. 679, 689-90 (D. Kan. 2001)(citations omitted). n8 When the discovery sought appears relevant on its face, the party resisting discovery has the burden of demonstrating that the requested information does not fall within the scope of discovery defined under Rule 26(b)(1). Hammond v. Lowe's Home Centers, 216 F.R.D. 666, 670 (D. Kan. 2003). Conversely, "when relevancy is not readily apparent, the party seeking discovery has the burden to show the relevancy of the request." Id.

> n8 Citing a 1991 case, plaintiffs assert that a request for discovery should be allowed "unless it is clear that the information sought can have no possible bearing on the *subject matter* of the action." Snowden v. Connaught Lab., Inc., 137 F.R.D. 336, 341 (D. Kan. 1991)(emphasis added). However, the holding in Snowden was based on the 1991 version of Fed. R. Civ. P. 26(b)(1) which has since been amended. As noted above, the current version of Rule 26(b)(1) limits the scope of discovery to "any matter, not privileged, that is relevant to the *claim or defense* of any party." (Emphasis added). There has been no showing of "good cause" for more expansive discovery; therefore, the scope of discovery in this case is limited to the claims and defenses asserted by the parties.
>
> Rule 26(b)(1) was amended in 1993 "to enable the court to keep tighter rein on the extent of discovery" because the "information explosion of recent decades" greatly increased the potential cost, delay, or oppression caused by wide-ranging discovery. Advisory Committee Notes, 1993 Amendments to Rule 26. Rule 26(b)(1) was again amended in 2000 to further narrow the scope of discovery and "involve the court more actively in regulating the breadth of sweeping or contentious discovery." Advisory Committee Notes, 2000 Amendments to Rule 26. Cases predating these amendments must be carefully scrutinized given the current version of Rule 26(b)(1) and the increased emphasis on judicial management of the discovery process.

[*14]

Once the threshold question of relevance has been satisfied, the analysis proceeds to whether the requested information is privileged or otherwise limited by the considerations set out in Rule 26(b)(2)(C)(1), (ii), or (iii). Generally, the party opposing discovery has the burden of demonstrating through detailed explanation, exhibit, and/or affidavit that the request is unduly burdensome or overly broad. See, e.g., Horizon Holdings Inc. v. Genmar

Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). However, the court may deny a motion to compel where the discovery request is overly board or unduly burdensome on its face. See, e.g., Aikens v. Deluxe Financial Services, Inc., 217 F.R.D. 533, 538 (D. Kan. 2003). With these standards in mind, the court turns to the parties' discovery disputes.

**Temporal Scope of Discovery**

Plaintiffs ask that the court "establish the scope of discovery dates from January 1, 2000 through August 30, 2006." Doc. 98, p. 19. Defendants oppose plaintiffs' request and, for the reasons set forth below, the court rejects plaintiffs' motion for a blanket order extending discovery back to January 1, 2000.

In the first place, plaintiffs [*15] do not identify any specific discovery request at issue in their attempt to extend the discovery period back to January 2000. Rather, plaintiffs argue that they have alleged a continuing violation and that "at least two plaintiffs were employed and effected in 2002 and 2003." Doc. 98, p. 17. Plaintiffs also argue that courts typically permit discovery in employment termination cases for a reasonable number of years before and after the alleged discrimination.

The court agrees that it is not unusual to allow discovery in employment discrimination cases to span a reasonable number of years. However, the determination of an appropriate time span requires sufficient information and argument upon which the court can make an informed decision. Here, plaintiffs point to no specific discovery requests and the court is left to speculate regarding why January 2000 is an appropriate date. n9 At best, it appears that plaintiffs pick January 2000 because it is approximately 5 years before Boeing's sale of its facilities to Spirit (June 16, 2005). However, if the effective date of the sale is a determinative benchmark, it is not clear why discovery dating back to January 2000 is necessary. n10 [*16]

n9 The conclusory allegation of a "continuing violation" is not sufficient justification for the time span requested by defendant. The events complained of occurred after January 1, 2002.

n10 As previously noted, Boeing commenced "Project Lloyd" in September 2003 and publicly announced its intent to sell the Wichita facilities in 2004.

More importantly, plaintiffs specifically allege that "defendant's common scheme began as early as January 2002." Plaintiffs' Amended Complaint, Doc. 40, p. 35. Given plaintiffs' contention of when Boeing's "scheme" commenced, plaintiffs' rationale for extending all discovery back to January 2000 is not apparent. Finally, plaintiffs' brief contains confusing language concerning the relevant time period. n11

n11 Plaintiffs request in the text of their brief that discovery extend back to January 2000. However, in a footnote plaintiffs propose that discovery extend back to January 1, 2002. Doc. 98, p. 17, footnote. 5.

[*17]

In light of the allegations in plaintiffs' amended complaint and the parties' arguments, the court concludes that a reasonable period of time for discovery extends back to January 1, 2002, the earliest date of Boeing's alleged scheme. n12

n12 This ruling should not be construed as a determination that there is no set of circumstances where discovery before January 1, 2002 might be relevant. Rather, plaintiffs' conclusory arguments for a blanket order extending *all* discovery back to January 2000 are simply not persuasive.

**E-Mail Search Protocol**

Plaintiffs move to compel Boeing and Spirit to produce e-mails under the following criteria:

**Covered Individuals:**

(1) all individuals involved in the decision making process of Project Lloyd; (2) all individuals involved in the decision to select the Wichita, Tulsa, and McAlester facilities for

sale.

**Time Period:**

(1) January 1, 2000.

**Scope:**

(1) e-mail transmitting spreadsheets regarding the lay-off/no [*18] hire decisions;

(2) e-mail transmitting reports/studies/surveys regarding the costs of pensions and the age of the workforce at Boeing;

(3) e-mail about lay-off/no hire decisions;

(4) e-mail transmitting lay-off instructions or guidelines and comments regarding such instructions or guidelines;

(5) e-mail containing the following search terms:

a. Project

b. Lloyd

c. Retirement

d. ERISA

e. Discrimination

f. Age

g. Lay-off

h. Lay off

i. Layoff

j. Benefit

k. Onex

l. Spirit

m. Geezer

n. Retire

o. Pension

p. Old

q. Midwestern Aircraft

r. Healthcare

s. Health care

Defendants oppose the motion to compel the e-mail materials, arguing that the request is overly broad and unduly burdensome. In support of its objection, Boeing explains (1) the process necessary to determine the location of e-mails and (2) the process for organizing and actually searching the files after the location of the e-mail data is identified. n13 Boeing estimates that it will take a knowledgeable team of computer staff at least five hours per employee to locate and retrieve e-mails stored on centralized servers. For users who stored e-mail in separate files on their respective [*19] hard drive or portable storage devices, Boeing estimates that the search time per employee will exceed one day. n14 Boeing also argues that the number of individuals "involved in the decision making process" is large and an unknown number of persons had multiple e-mail addresses and encrypted their e-mail messages. n15 Boeing also complains that the use of relatively common terms will produce a large volume of e-mail messages having nothing to do with the issues in this case. n16

n13 Computer servers storing e-mail are located in (1) St. Louis, Missouri, (2) Huntsville, Alabama, and (3) Seattle, Washington. In addition to the servers, e-mail users also retain e-mail materials on their individual computer hard drives and portable storage devices. Because not all e-mail materials are stored on servers, Boeing would need to contact each individual user to determine where e-mail materials are located.

n14 Boeing's response contains a relatively technical explanation of the processes necessary to locate and search for the requested e-mail

materials. However, because the court will schedule oral argument on the issue of e-mail production, a detailed recitation of the technical requirements is unnecessary at this time.

[*20]

n15 Assuming that plaintiffs intend to include those individuals who made the decision as to which employees would be offered jobs with Spirit, the request involves approximately 550 individuals. With respect to "Project Lloyd" and Boeing's decision to sell its facilities, approximately 100 persons were either (1) decision makers or (2) played a significant role in providing information and advice.

n16 For example, plaintiffs' request for every e-mail containing the term "benefit" includes all e-mail in which the sender's signature included his or her title of "Benefits Administrator."

Spirit's objections are similar to the arguments asserted by Boeing. However, because Spirit utilized a variety of computer resources during the early stages of its operations, the search is more complex and estimated to take at least two days per employee. n17 In addition, Spirit currently has no software to decrypt e-mails that were previously on Boeing's system; therefore. Spirit would be forced to (1) contract with Boeing for services to decrypt the e- mails or (2) require each computer user to decrypt [*21] his or her own e-mail.

n17 For example, Spirit contracted with an outside vendor (Cox Communications) to provide interim e-mail accounts for a limited number of Spirit employees during its first year of operations. Spirit also utilized "legacy" e-mail files for e-mail stored on Boeing computer servers prior to June 3, 2006. E-mails created after June 2006 are stored on a Spirit server.

In their reply brief, plaintiffs argue that defendants' burden "is not undue and that the benefits that plaintiffs will gamer from electronic mail search vastly outweigh the defendants' burdens." Doc. 126, p. 25. Plaintiffs also argue that defendants have failed to show an undue burden because: (1) the number of individuals with e-mail on their individual hard drive is unknown, (2) the number of files is unknown; and (3) the number and size of the e-mail for targeted individuals is unknown. With respect to this latter argument concerning "unknowns," plaintiffs' position is misguided. It is precisely because there are "unknowns" [*22] that plaintiffs' request imposes a greater burden on defendants. For example, because there are variations in the storage locations for e-mail, defendants are tasked with individually questioning each e-mail user concerning their respective practices so that all e-mail sources are identified for searching.

Plaintiffs' argument that the benefits of discovery outweigh defendants' burden raises a more difficult question because of the expansive nature of their e-mail requests and the number of e-mail users involved. In order to better evaluate this discovery request, the court will set this matter for a hearing. At a minimum, the parties should address the following questions:

1. How many persons are covered by plaintiffs' e-mail search protocol? n18

2. Although Boeing has estimated the amount of hours to locate and search for e-mail, what is the estimated cost?

3. Exactly what are the "benefits of discovery" that plaintiffs reference?

4. Does the number of search terms materially increase the cost?

5. Should the costs of electronic discovery be borne by plaintiffs?

6. Is there a more efficient method for discovery than electronic searches?

7. What [*23] computer resources or expertise did plaintiffs rely on in formulating a search protocol? If the information is produced, how will plaintiffs' process the data?

n18 As noted, it is unclear whether the search involves 550, 100, or a smaller number of people. If, as argued by Boeing, the e-mail is not located in a centralized data base, the number of persons involved is a major issue. Search of a few centralized data bases is materially different from searching 550 individual computers and/or storage systems.

**Individual Discovery Requests to Boeing**

**Interrogatory No. 2**

Plaintiffs move to compel Boeing to answer the following interrogatory:

> If you contend that current or future costs related to pension or health care costs for employees was not a factor in the decision to sell the Boeing plants at issue, please provide a factual basis for such contention and identify all documents that support this contention.

Boeing did not answer the interrogatory and asserted that the request [*24] was "overly broad, unduly burdensome, vague, and not reasonably calculated to lead to admissible evidence." Boeing also asserted in a conclusory statement that its reasons for selling the Wichita Division are irrelevant to the issue of who received a job offer from Spirit.

The court is satisfied that the requested information is relevant. The theory of plaintiffs' age discrimination and ERISA claims is that defendants engaged in a scheme to reduce expenses by eliminating older employers who presumably have higher health care and pension costs and plaintiffs are entitled to know whether pension and health care costs were a factor in the decision to sell the facilities. n19 Accordingly, plaintiffs' motion to compel Boeing to answer Interrogatory No. 2 shall be GRANTED.

n19 Boeing's boilerplate objections that the interrogatory is overly broad, unduly burdensome and vague are not supported and therefore rejected.

**Interrogatory No. 8**

Interrogatory No. 8 requests that Boeing:

> Identify each and [*25] every meeting that took place involving management or executive level employees regarding the sale of Boeing plants that ultimately ended with the sale of the plants at issue in this matter being sure to identify any documents that support this answer.

Boeing objected to answering this interrogatory, arguing that the request is overly broad and unduly burdensome. The court agrees. Answering the interrogatory would require Boeing to identify hundreds, if not thousands, of meetings that occurred concerning the sale of the Wichita, Tulsa, and McAlester facilities. The meetings involved a wide variety of topics such as real estate, environmental issues, supply contracts, and intellectual property that are irrelevant to the issue raised by plaintiffs' claims. Because the request is overly broad and unduly burdensome on its face, the Motion to compel Boeing to answer Interrogatory No. 8 shall be DENIED.

**Interrogatory No. 9**

Interrogatory No. 9 asks:

> If you contend that no employee was retaliated against because exercising protected rights, please provide a factual support for such contention being sure to identify all documents that support your answer. n20

[*26]

In response to the interrogatory, Boeing cited earlier interrogatory answers explaining that it terminated *all* employees in its commercial divisions at its Wichita, Tulsa, and McAlester facilities at the time of the June 16, 2005 sale to Sprint and that Boeing was not involved in the recommendations or determinations of who would be hired by Spirit. n21 Because Boeing has explained why it contends no employee was subjected to retaliation, plaintiffs' motion to compel Interrogatory No. 9 shall be DENIED.

n20 A number of plaintiffs' discovery requests contain questionable grammatical choices. For purposes of accuracy and consistency, the court quotes plaintiffs' discovery requests verbatim without modification or correction.

n21 In addition to citing its answers to Interrogatory Nos. 4 and 5, Boeing provided documents for individuals who (1) filed for disability, (2) filed for workers compensation, filed a lawsuit against Boeing, or (4) lodged a complaint against a manager. Production Request No. 11.

[*27]

**Interrogatory No. 10**

Plaintiffs ask Boeing to:

> Please describe the process that was utilized to determine which employees would not be recommended for hire by Spirit or laid off by Boeing.

With respect to layoffs, Boeing states that it terminated *all* employees in the commercial divisions in Wichita, Tulsa, and McAlester. Because *all* employees were terminated as part of the sales transaction, Boeing did not engage in a process "to determine *which* employees" would be laid off. n22 Accordingly, Boeing has sufficiently answered the portion of the interrogatory concerning "layoffs."

n22 Boeing answered Interrogatory No. 10 by citing its response to Interrogatory Nos. 4 and 5.

However, Boeing's response concerning the process of determining "which employees would not be recommended for hire by Spirit" is inadequate and incomplete. At best, Boeing argues that it "was not involved in the recommendations or determinations of who would be hired by Spirit." However, the discovery [*28] issue before the court is not whether Boeing was "involved" but rather whether Boeing is able to shed light on the facts concerning the "process." n23 Boeing shall answer the interrogatory and, at a minimum, describe its understanding of the process for "determining which employees would not be recommended for hire by Spirit." Plaintiffs' motion to compel Interrogatory No. 10 is GRANTED IN PART, consistent with the court's ruling.

n23 Boeing asserts in its answer to Interrogatory No. 4 that it "was not involved in the recommendations or determinations of who would be hired by Spirit" and also incorporates its answer to Interrogatory No. 3. In answering Interrogatory No. 3, Boeing again asserts that it was not involved in the recommendations or determinations of who would be hired by Spirit but also states: "**Boeing managers** were acting as representatives of the new company **in making recommendations.**" Boeing's Response Brief, Doc. 115, Exhibit 1A (emphasis added).

Apparently, Boeing managers did make recommendations concerning the employees Spirit should hire. The assertion by Boeing that recommendations were made in a "representative" capacity is unresponsive to the question asked by Interrogatory No. 10. Equally important, Boeing, Onex, and Spirit are all represented in this lawsuit by the same attorneys. Factual information known to a party and its counsel must be disclosed in an interrogatory answer.

[*29]

**Interrogatory No. 11**

Interrogatory No. 11 asks Boeing:

> If you contend that the process used to select individuals for lay-off or not to hire with Spirit was not excessively subjective, please provide a factual support for such contention being sure to identify all documents that support your answer.

Again, with respect to the issue of layoffs, Boeing's answer that all employees were laid off is sufficient. However, Boeing has not provided an appropriate answer to the question of whether or not the process for selecting individuals for hiring by Spirit was excessively

subjective. The motion to compel Interrogatory No. 11 is GRANTED IN PART and Boeing shall answer the portion of the interrogatory concerning the hiring process.

**Production Request No. 9**

Plaintiffs seek to compel Boeing to produce:

> All documents, manuals, handbooks, policies, procedures, notices or directives issued by the defendant pertaining to:
>
> a. Recruitment;
> b. Selection and hiring;
> c. Objective testing;
> d. Subjective evaluations;
> e. Position requirements;
> f. Job posting;
> g. Job assignment;
> h. Seniority system;
> i. Discipline;
> j. Demotion;
> k. Transfer;
> l. Layoff; [*30]
> m. Discharge;
> n. Training programs or skill acquisition opportunities;
> o. Investigations of employees; and
> p. Promotions.

Boeing agreed to produce (1) written policies relating to discipline and layoff benefits, (2) the Collective Bargaining Agreements in effect as of June 15, 2005, and (3) job descriptions in effect just before the divestiture. However, Boeing objects to the remaining requests as irrelevant, overly broad, and unduly burdensome.

Plaintiffs concede that their request "may not be relevant on its face" but argue that the requested materials provide "important background information on how Boeing worked." Doc. 98, p. 14, footnote 4. Plaintiffs also argue that they "are entitled to determine if defendants have any other policies that are discriminatory against older workers." Id.

Neither argument by plaintiff, is persuasive. As noted above, the scope of discovery in Rule 26(b)(1) has been amended and narrowed and, absent a showing of good cause, the scope of discovery is limited to the claims and defenses asserted in the case. n24 Plaintiffs' far- reaching request for discovery materials based on the need for "background information" is not sufficiently [*31] tailored to the claims or defenses asserted in this case. Similarly, plaintiffs' assertion that they are entitled to determine whether defendants have *any other* discriminatory policies against older workers is not persuasive. "The [2000 Amendment to Rule 26(b)(1)] signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." Advisory Committee Notes. 2000 Amendments to Rule 26. n25

> n24 Plaintiffs proffer no showing of "good cause" to expand the scope of discovery to "any matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1).

> n25 Plaintiffs' suggestion that they are entitled to discover the listed employment practices because they alleged a "pattern and practice" is also not persuasive. Plaintiffs' claims in this case are based on wrongful terminations for purposes of saving healthcare and pension costs. Under the circumstances, their broad discovery request for topics such as training, promotions, or discipline are an unwarranted fishing expedition.

[*32]

In addition to exceeding the scope of relevant discovery, Production Request No. 9 is overly broad and unduly burdensome on its face because the request specifically asks for "*all documents,* manuals, handbooks, policies, procedures or directives issued by defendant" pertaining to the 16 areas of employment. (Emphasis added). The all-inclusive request for documents is excessive for purposes of securing "background" information. Accordingly, plaintiffs' motion to compel Production Request No. 9 is DENIED.

**Production Request No. 13**

Plaintiffs seeks to compel:

> All documents that show the *identity* of any person, company, or other entity contacted, consulted, or retained to analyze, review, or otherwise evaluate all financial aspects of the sale of any Boeing plants that ultimately ended with the sale at issue in this matter. (Emphasis added).

Boeing opposes the motion, arguing that it has identified the retained consultants that it used during the transaction and that plaintiffs have not shown why they are entitled to *all documents* showing the individuals' or companies' identities. In addition, Boeing argues that over 4,000 persons were contacted, [*33] consulted or retained concerning this transaction and that producing all documents that identify such individuals is unduly burdensome and overly broad. Plaintiffs counter that Boeing's representation that it has disclosed the retained consultants' names is not a proper response to a Rule 34 request for production of documents. Plaintiffs also argue that it requested the names of people who "were contacted and not simply retained."

The motion to compel Production Request No. 13, as currently drafted, shall be DENIED. To the extent plaintiffs seek the identity of retained consultants, Boeing's representation that it utilized an investment banker (Goldman Sachs & Co.) and an accounting firm (KPMG) is sufficient. n26 With respect to consultants that were contacted but not retained, the relevance of such information is not obvious and plaintiffs have failed to present a persuasive argument that such information is relevant. n27 Accordingly, the motion to compel shall be DENIED. n28

> n26 Under Rule 26(b)(2), the court may limit the use of a discovery method if the information is "obtainable from some source that is more convenient, less burdensome, or less expensive." [*34]

> n27 Because financial consultants do not work for free, one would not expect a consultant who had been contacted but not retained would possess relevant information not otherwise available from Boeing or its *retained* consultants.

> n28 The wording of the production request causes some uncertainty as to what is requested. It is not clear whether plaintiffs seek the identity of persons who analyzed the entire transaction (persons retained to "evaluate *all* financial aspects") or individuals who analyzed only a portion of the financial issues, such as lease or rental agreements. The number of consultants analyzing the entire financial transaction would be relatively small. However, the number of individuals providing input on the various components would be significant. To the extent plaintiffs seek the identity of persons who consulted on any financial aspect of the sale, the request is overly broad because it would include material on irrelevant topics such as environmental issues and supply contracts.

**Production Request No. 15**

Plaintiffs seek to compel:

> All documents [*35] that reflect any aspect of a financial analysis for Project Lloyd or the sale of all Boeing plants that ultimately led to the sale of the Wichita, Tulsa and McAlester plants.

Boeing opposes the motion to compel, arguing that the request is overly broad, unduly burdensome, and requests information lacking relevance to the claims in this case. The court agrees that the request is overly broad and unduly burdensome; therefore, the motion to compel Production Request No. 15 shall be DENIED. n29 A request for "*all* documents that reflect *any* aspect of a financial analysis" is overly broad on its face since it requires Boeing to gather and produce documents concerning subjects such as state and local sales tax issues which have no relevance to the claims in this case. Equally important, Boeing represents that electronic information stored in two of its servers related to Project Lloyd equals approximately 22 gigabytes of information and that documents made available to prospective purchasers with Boeing's Offering Memorandum filled 54 boxes. n30 Given the volume of documents and records involved, a request for "all documents that reflect any aspect" is overly broad and unduly [*36]

burdensome. n31

n29 Plaintiffs argue that even if their request for "all documents" is overly broad, defendants must still produce documents to the extent such documents are not objectionable. Citing Johnson v. Kraft Foods North America, Inc., 236 F.R.D. 535, 542 (D. Kan. 2006). Plaintiffs' reliance on Johnson is troubling. While recognizing that a party has a duty under the federal rules of discovery to respond to the extent that discovery requests are not objectionable, Judge Waxse specifically held that no response is required "when inadequate guidance exists to determine the proper scope of a request." Id. Here, as in Johnson, an objection was properly lodged to the production request. The remaining portion of the production request fails to provide adequate guidance for Boeing to determine the proper scope of production.

n30 Boeing represents that one gigabyte is roughly equivalent to a pickup truck load of documents.

n31 As a practical matter, even if the documents were ordered produced, plaintiffs would have to develop some type of process to narrow their search for relevant documents. The criteria should be narrowed now rather than after huge volumes of data have been produced. The court is particularly reluctant to require defendant to sort through and produce truckloads of data that has no relevance to the case.

Additionally, Boeing provided plaintiffs with an index of the documents made available to the prospective purchasers. There is no indication that plaintiffs narrowed their production requests after reviewing the index.

[*37]

**Production Request No. 21**

Production Request No. 21 requests:

> All studies, reports, or analysis done by internal staff, consultants, government agencies, or others related to the pensions and/or retirement benefits of employees of each Boeing plant that Boeing considered selling during the relevant time period.

Boeing opposes production of the requested documents, arguing that the pension and retirement studies lack relevance for the reasons contained in its motion for judgment on the pleadings. Doc. 99. However, Boeing's motion for judgment on plaintiffs' claim of interference with ERISA rights was denied; therefore, its arguments concerning a lack of relevance are moot.

Boeing also argues that the request is overly broad and unduly burdensome. The court does not agree. Contrary to other production requests for "all documents," plaintiffs only requested "studies, reports, or analysis" of pension and retirement benefits at plants that Boeing considered selling during the relevant time period. Because the request is sufficiently narrow, Boeing's objections that the request is overly broad and unduly burdensome are rejected. Accordingly, plaintiffs' motion [*38] to compel the "studies, reports, or analysis" requested in Production Request No. 21 shall be GRANTED.

**Production Request No. 24**

Production Request No. 24 asks Boeing to:

> Please produce any and all documents involving negotiations (including but not limited to, all offers, counter offers, memos, letters, and rejections) between Boeing and any other entity regarding the sale of any Boeing plant, including the Wichita, Tulsa and McAlester locations within the relevant time period.

Boeing opposes the motion to compel, arguing that in the course of negotiating the sale, Boeing and Onex addressed many business issues, such as the real estate involved in the sale, and that the majority of time spent in negotiations related to intellectual property issues and supplier contracts pursuant to which Spirit would sell component parts and subassemblies to Boeing. The court agrees that negotiations related to intellectual property issues and supplier contracts have no apparent relevance

to this case and such materials need not be produced. However, the gravamen of plaintiffs' lawsuit is that Boeing and Onex schemed to get rid of older employees to reduce health care and [*39] pension costs. Because the negotiations go to the heart of plaintiffs' theory of a scheme, plaintiffs' motion to compel Production Request No. 24 shall be GRANTED, with the exception of negotiations concerning supplier contracts and intellectual property issues. n32

> n32 The court recognizes that the negotiations likely include topics having little or no relevance to the claims in this case. However, because supplier contracts and intellectual property issues apparently made up the majority of the negotiations, the materials ordered produced are greatly reduced.

**Production Request No. 28**

Production Request No. 28 asks Boeing to:

> Produce all documents submitted to any government entity regarding the sale of the Boeing plants at issue in this litigation.

Although plaintiffs list this production request as one of the matters to be compelled in their motion, neither party presents any argument concerning Production Request No. 28. In the absence of any argument, the motion to compel Production [*40] Request No. 28 shall be DENIED WITHOUT PREJUDICE.

**Production Request Nos. 29 and 34**

The parties have resolved these two requests and the motion to compel Production Request Nos. 29 and 34 is MOOT. Doc. 115, p. 1, footnote 1; Doc. 126, p. 19, footnote 6.

**Production Request No. 36**

Plaintiffs move to compel:

> All minutes or notes from any meeting of the corporation, its officers or directors, from January 1, 2000 until the present where the age of Boeing's workforce, healthcare costs, pension costs, and/or the sale of Boeing plants was discussed.

Boeing opposes the motion to compel, arguing that the request is overly broad and unduly burdensome. As previously noted, the court is not persuaded that discovery extending back to January 1,2000 is warranted and the temporal scope shall be limited to January 1, 2002. With respect to officers or directors, the court is of the opinion that the request for minutes or notes is sufficiently narrow and appropriate and that portion of Production Request No. 36 shall be GRANTED. However, plaintiffs' request for notes "from any meeting of the corporation" is too broad because it encompasses *all* employee "meetings" [*41] where the sale of the plant was discussed. n33 The motion to compel notes from any meeting of the corporation shall be DENIED WITHOUT PREJUDICE and plaintiffs may clarify and narrow their request.

> n33 For example, the request would include notes from *any* meeting by lower level employees discussing real estate issues related to the sale--matters that have no relevance to this lawsuit. Similarly, a meeting between a supervisor and an engineer concerning an environmental report would be included in this request. Under the circumstances, a request for *all* meeting notes where the sale was discussed is simply overly broad.

**Production Request No. 42**

Production Request No. 42 requests:

> All worksheets and spreadsheets regarding or relating to the decision to sell the Boeing plants in issue.

Although Boeing objects to Production Request No. 42, the motion to compel shall be GRANTED. Boeing has failed to make a showing that the request is overly broad or unduly burdensome. Moreover, the [*42] request appears relevant because the documents will show whether pension and healthcare benefits factored into Boeing's decision-making process.

**Production Request No. 51**

Plaintiffs seek to compel:

> All documents received by defendant from any financial consultant, investment banker, or investment service commenting on, recommending, or cautioning a layoff relating in any way with the sale of the Boeing plants that were considered for sale since January 1, 2000.

Although Boeing objects to this request based on a lack of relevance, the court is satisfied that the request is relevant because it is reasonably calculated to lead to the discovery of admissible evidence. n34 Boeing's argument that the request is overly broad is not persuasive and there is no evidence that gathering the materials would be unduly burdensome. The motion to compel Production Request No. 51 shall be GRANTED with the caveat that the temporal scope is modified to January 1, 2002.

> n34 For example, a memo from a consultant cautioning Boeing to avoid the appearance of age discrimination may lead to evidence of efforts to conceal discriminatory conduct.

[*43]

**Individual Discovery Requests to Spirit**

**Production Request No. 11**

Plaintiffs move to compel Spirit to produce:

> All documents that show the identity of any person, company, or other entity contacted, consulted, or retained to analyze, review, or otherwise evaluate all financial aspects of the purchase of the Boeing plants at issue in this matter.

Spirit opposes the production request and provides the names and addresses of the 11 consulting firms it utilized during the transaction. Both Spirit and plaintiffs assert arguments identical to those raised by Boeing and plaintiffs concerning plaintiff's Request No. 13 to Boeing. For the reasons set forth above concerning Request No. 13, plaintiffs' motion to compel Spirit to produce materials responsive to Production Request No. 11 shall be DENIED.

**Production Request No. 13**

Similar to Request No. 15 to Boeing, plaintiffs seek to compel Spirit to produce:

> All documents that reflect any aspect of a financial analysis regarding the purchase of the Boeing plants at issue in this matter.

Sprint opposes the motion, arguing that its records concerning the transaction are voluminous and [*44] that the request is overly broad and unduly burdensome. n35 For the same reasons plaintiffs' motion to compel Request No. 15 was denied, Plaintiffs' motion to compel Spirit to produce all documents responsive to Production Request No. 13 shall be DENIED.

> n35 Spirit estimates that it has approximately 14 gigabytes of electronic data concerning the sale.

**Production Request No. 17**

Plaintiffs move to compel Spirit to produce:

> All studies, reports, or analysis done by internal staff, consultants, government agencies or others related to the pensions, and/or retirement benefits of employees of each Boeing plant that Spirit considered purchasing from Boeing during the relevant time period.

This request is similar to Production Request No. 21 to Boeing. For the reasons discussed above concerning Request No. 21, plaintiffs' motion to compel Spirit to provide materials responsive to Production Request No. 17 shall be GRANTED.

**Production Request No. 18**

Production No. 18 requests that [*45] Spirit produce:

> All documents, including but not limited to studies, reports, memoranda, and notices, relating to the analysis of health care benefits of employees at all plants that you considered purchasing from Boeing and the potential cost to health care benefits of employees of Spirit. n36

Similar to Production Request No. 17, plaintiffs' motion to compel studies and reports related to the analysis of health care benefits and costs shall be GRANTED.

> n36 During the meet and confer process, plaintiffs offered to "limit this request to all documents that address the costs of pensions and health care as well as all studies and reports, and memoranda that relate to the analysis of the costs of pension and health care benefits" but that Spirit still refused to produce the documents. The court sees no material difference between the original request and plaintiffs' proposal.

**Production Request No. 20 and Production Request No. 29**

Request No. 20 asks Spirit to:

> Please produce [*46] any and all documents that reflect any and all stages of negotiations between Spirit and Boeing for the purchase of any Boeing plant within the relevant time period.

Request No. 29 asks Spirit to:

> Please produce any and all documents involving negotiations (including, but not limited to, all offers, counter offers, memos, letters, and rejections) between Spirit and Boeing regarding the purchase of any Boeing plant, including the Wichita, Tulsa, and McAlester locations within the relevant time period.

These production requests are similar to Production Request No. 24 to Boeing which asked for materials concerning negotiations. For the reasons set forth in the order granting plaintiffs' motion to compel Request No. 24, plaintiffs' motion to compel Request Nos. 20 and 29 shall be GRANTED with the exception of negotiations concerning supplier contracts and intellectual property issues.

**Production Request No. 21**

Production Request No. 21 asks Spirit to:

> Please produce all documents that comment on the costs and other financial information that Spirit considered during the purchase of the Boeing plants at issue in this case.

Spirit opposes [*47] the motion, arguing that the request is overly broad and unduly burdensome. The court agrees. The request for "all documents" commenting on "costs" and "financial information" would include documents on such irrelevant issues as real estate leases, supplier contracts, and tax issues, matters which have no relevance to this lawsuit. Accordingly, the motion to compel Production Request No. 21 shall be DENIED.

**Production Request No. 28**

Similar to plaintiffs' Production Request No. 36 to Boeing, plaintiffs move to compel Spirit to produce:

> All minutes or notes from any meeting of the corporation, its officers, or directors regarding health care costs, pensions, age discrimination, and/or layoffs.

Spirit opposes the motion to compel, arguing that the request is overly broad and unduly burdensome. With respect to officers or directors, the court is of the opinion that the request for minutes or notes is sufficiently narrow and appropriate and that portion of Production Request No. 28 shall be GRANTED. However, plaintiffs' request for notes "from any meeting of the corporation" is too broad because it encompasses *all* employee "meetings" where health care, pensions, [*48] age discrimination and/or layoffs may have been discussed. n37 The motion to compel notes from *any* meeting of the *corporation* shall be DENIED WITHOUT PREJUDICE and plaintiffs may clarify and narrow their request.

> n37 For example, the request, as presently

> drafted, would include notes from meetings between an individual employee and a benefit coordinator concerning health care or pension questions. Under the circumstances, a request for *all* meeting notes where the sale was discussed is simply overly broad.

**Production Request No. 30**

Plaintiffs request that Spirit:

> Please produce any and all documents that reflect the expenses related to the acquisition of Boeing plants, restructuring; and other expenses related to the initial setup of Spirit Aerospace following your purchase of the Boeing plants.

The motion to compel this information shall be DENIED. Spirit's acquisition and setup expenses have no apparent relevance to the claims in this case and plaintiffs have failed to [*49] present any valid rationale for the discovery of this information.

**Production Request No. 39**

Plaintiffs move to compel Spirit to produce:

> All documents, including e-mails, about how the costs of pensions and health care benefits would affect your decision to purchase the Boeing plants at issue.

This information is relevant to the claims in this case and Spirit's arguments that the request is overly broad and unduly burdensome are not persuasive. Therefore, the motion to compel Production Request No. 39 shall be GRANTED.

**Production Request No. 42**

Production Request No. 42 asks Spirit to produce:

> All documents received by defendant from any financial consultant, investment banker, or investment service commenting on, recommending, or cautioning a lay-off or of employees not hired or retained relating in any way with the purchase of the Boeing plants that were considered for purchase since January 1, 2000.

Contrary to Spirit's objection, this request seeks relevant information reasonably calculated to lead to the discovery of admissible evidence. In addition, the request is narrowly tailored to secure information concerning layoff [*50] or hiring issues. Accordingly, the motion to compel Production Request No. 42 shall be GRANTED but the temporal scope is limited to a period of time commencing January 1, 2002.

**Production Request No. 46**

Request No. 46 asks Spirit for:

> All documents that were generated during all meetings where decisions were made to extend or not extend offers of employment to Boeing employees.

Plaintiffs have withdrawn this request. Doc. 126, p. 23, footnote 7. Accordingly, the motion to compel Production Request No. 46 is MOOT.

**IT IS THEREFORE ORDERED** that plaintiffs' motion to compel **(Doc. 97)** is **GRANTED IN PART and DENIED IN PART,** consistent with the rulings set forth above. A deadline for defendants to answer the interrogatories and produce documents will be established after the hearing concerning e-mail production. The hearing will be held on January 26, 2007 at 10:00 a.m. in United States Courthouse, Courtroom 326, 401 North Market, Wichita, Kansas.

A motion for reconsideration of this order under D. Kan. Rule 7.3 is not encouraged. The standards governing motions to reconsider are well established. A motion to reconsider is appropriate where [*51] the court has obviously misapprehended a party's position or the facts or applicable law, or where the party produces new evidence that could not have been obtained through the exercise of reasonable diligence. Revisiting the issues already addressed is not the purpose of a motion to reconsider and advancing new arguments or supporting facts which were otherwise available for presentation when the original motion was briefed or argued is inappropriate. Comeau v. Rupp, 810 F. Supp. 1172 (D. Kan. 1992). Any such motion shall not exceed three

pages and shall strictly comply with the standards enunciated by the court in Comeau v. Rupp. The response to any motion for reconsideration shall not exceed three pages. No reply shall be filed.

**IT IS SO ORDERED.**

Dated at Wichita, Kansas this 17th day of January 2007.

S/ Karen M. Humphreys

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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|---|---|
| STATE OF OKLAHOMA, ex rel W.A. DREW EDMONDSON in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, ET AL.<br>Plaintiff,<br><br>vs.<br><br>TYSON FOODS, INC., ET AL.<br>Defendants. | Case No. 05-CV-0329-GKF-SAJ |

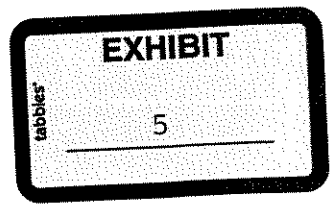
## STATE OF OKLAHOMA'S RESPONSE TO DEFENDANT'S REQUEST'SFOR ADMISSION

Pursuant to Fed. R. Civ. P. 36, plaintiff State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), objects and responds as follows to "Defendants' Requests for Admission to the State of Oklahoma":

## GENERAL OBJECTIONS

1. The State objects to the definition of "Plaintiffs," "you" and "your" to the extent it includes "all offices, personnel, entities, and divisions of the Oklahoma state government" and to the extent it includes "W.A. Drew Edmondson and the office of the Oklahoma Attorney General, Miles Tolbert and the office of the Oklahoma Secretary of the Environment and their attorneys, experts, consultants, agents and employees." The plaintiff -- singular -- in this action is the State as sovereign; it is not these additional entities and individuals. Accordingly, wherever in these requests for admission the terms "Plaintiffs" [sic], "you" and "your" are used the State is responding as the sovereign and the sovereign alone.





2. The State objects to the definition of "non-point source." The CWA does not define "non-point source." *See American Wildlands v. Browner*, 260 F.3d 1192, 1193 (10th Cir. 2001) ("Unlike point source discharges, nonpoint source discharges are not defined by the Act. One court has described nonpoint source pollution as 'nothing more than a [water] pollution problem not involving a discharge from a point source.'") (citation omitted).

3. The State objects to the definition of "CERCLA Hazardous Substances List" insofar as it might (or is intended to) create the erroneous impression that specific mention on the defendant-defined "CERCLA Hazardous Substances List" is the sole inquiry for triggering CERCLA liability with respect to "hazardous substances." It is important to note that the concentration of a hazardous substance is not relevant to whether CERCLA liability is triggered for a substance. Further, it is enough that a mixture or waste solution contain a hazardous substance for that mixture or solution to be deemed hazardous under CERCLA. Yet further, even if a material is not specifically listed as a hazardous substance, if its components include one or more hazardous substances, the material falls under CERCLA. Finally, the listing of elemental chemicals on various EPA lists used in CERCLA is intended to include compounds of such chemicals for purposes of determining whether a chemical / chemical compound is a hazardous substance for purposes of CERCLA liability.

4. The State objects to these discovery requests to the extent that they seek the admission or denial of matters that are protected by the attorney-client privilege and/or the work product doctrine, or to the extent that they require the State to admit or deny matters which are the subject of review by expert consultants which has not yet been completed.

5. The State objects to these requests for admission because the purport to require the State to admit or deny matters without any limitation in time, which makes them overly

broad, oppressive, unduly burdensome and expensive to answer. Determining whether a particular act or event has ever occurred would needlessly and improperly burden the State.

6. The State objects to these requests for admission to the extent that they do not state with the required degree of specificity and particularity what matter is sought to be admitted or denied. As such, such requests are vague, indefinite, ambiguous and not susceptible to easily discernible meaning, requiring the State to guess as to what it is admitting or denying, or to admit or deny a statement readily susceptible to alternative interpretations.

7. The State objects to the definition of "human feces" as including urine, which is contrary to the common definition, and makes requests to admit subject to being misconstrued.

8. The State objects that Defendants' various definitions of "elemental" phosphorus, nitrogen, copper, arsenic, and zinc (Definitions 8, 10, 12, 14, and 16) and "compounds" of phosphorus, nitrogen, copper, arsenic and zinc, (Definitions 9, 11, 13, 15, and 17) are unrealistic, contrary to science, and ambiguous in their application because "compounds" of each constituent necessarily contain the "elemental" form. However, for purposes of the admissions and denials which follow (and for these purposes alone), the State "accepts" Defendants' definitions that each "elemental" constituent is pure and unmixed with any other element while each "compound" contains the "elemental" constituent in chemical combination with another element. For purposes of the admissions and denials which follow (and for these purposes alone), the State will engage in the fictional premise that "elemental" constituents and "compounds" of those constituents as defined by Defendants are mutually exclusive terms.

## REQUESTS FOR ADMISSION

### I. PLAINTIFF'S DISCOVERY CONDUCT

**REQUEST FOR ADMISSION NO. 1:**

On one or more occasions during investigation and sampling in the Illinois River Watershed Plaintiffs entered a property without obtaining permission from the owner or administrator of the property.

**RESPONSE TO REQUEST NO.1**

The State objects to the term "Plaintiffs" and further objects to this request as irrelevant, as it is not relevant to any claim or defense of any party and is not likely to lead to admissible evidence.

**REQUEST FOR ADMISSION NO. 2:**

On one or more occasions during investigation and sampling in the Illinois River Watershed Plaintiffs collected samples of surface water, ground water, soil, sediment, or other media from a property without obtaining permission from the owner or administrator of the property.

**RESPONSE TO REQUEST NO. 2**

The State objects to the term "Plaintiffs" and further objects to this request as irrelevant, as it is not relevant to any claim or defense of any party and is not likely to lead to admissible evidence.

**REQUEST FOR ADMISSION NO.3**

On one or more occasions during investigation and sampling in the Illinois River Watershed Plaintiffs installed a sampling or monitoring device or devices on a property without obtaining permission from the owner or administrator of the property.

**RESPONSE TO REQUEST NO. 3**

The State objects to the term "Plaintiffs" and further objects to this request as irrelevant, as it is not relevant to any claim or defense of any party and is not likely to lead to admissible evidence.

**REQUEST FOR ADMISSION NO. 4**

On one or more occasions during investigation and sampling in the Illinois River Watershed Plaintiffs asked poultry producers who contract with one or more Defendants for permission to take samples or install a monitoring device on their property without notifying the Defendant with whom the poultry producer contracted or the poultry producer's counsel.

**RESPONSE TO REQUEST NO.4**

The State objects to the term "Plaintiffs" and further objects to this request as irrelevant, as it is not relevant to any claim or defense of any party and is not likely to lead to admissible evidence.

## II. PLAINTIFF'S STANDING TO BRING THE CLAIMS IN THE FIRST AMENDED COMPLAINT

**REQUEST FOR ADMISSION NO. 5**

The State of Oklahoma does not hold any interest in any natural resources in Oklahoma that have been committed or conveyed by the United States Government to Native American tribes.

**RESPONSE TO REQUEST NO. 5**

Denied.

**REQUEST FOR ADMISSION NO. 6**

The State of Oklahoma does not hold any interest in any natural resource within the political boundaries of Arkansas.

**RESPONSE TO REQUEST NO.6**

Admitted.

**REQUEST FOR ADMISSION NO. 7**

The State of Oklahoma does not hold any interest in any lands or soils that are owned or held in trust by private parties.

**RESPONSE TO REQUEST NO.7**

Denied.

**REQUEST FOR ADMISSION NO. 8**

Oklahoma Attorney General W.A. Drew Edmondson does not represent the State of Arkansas, the citizens of Arkansas, the United States Government, or any Native American tribes in this litigation.

**RESPONSE TO REQUEST NO. 8**

Admitted.

## III. PLAINTIFF'S CLAIMS THAT CERTAIN "HAZARDOUS SUBSTANCES" HAVE BEEN ALLEGEDLY "DISPOSED OF" OR "RELEASED" IN THE ILLINOIS RIVER WATERSHED THROUGH EACH DEFENDANT'S ACTIVITIES AND OPERATIONS

**REQUEST FOR ADMISSION NO. 9**

The following substances occur naturally within the Illinois River Watershed: phosphorus compounds, elemental nitrogen, nitrogen compounds, elemental arsenic, arsenic compounds, elemental zinc, zinc compounds, elemental copper, copper compounds, hormones, bacteria and bacteria.

**RESPONSE TO REQUEST FOR ADMISSION NO.9**

The State objects to the term "naturally" as it is not defined. The State interprets "naturally" to mean that these substances would have occurred in nature before human

intervention. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiving any objection, the State denies that elemental nitrogen, elemental arsenic, elemental zinc, and elemental copper occur naturally within the Illinois River Watershed. The State admits that phosphorus compounds, nitrogen compounds, arsenic compounds, zinc compounds, hormones and bacteria may occur naturally within the Illinois River Watershed.

**REQUEST FOR ADMISSION NO. 10**

Poultry litter does not contain elemental phosphorus.

**RESPONSE TO ADMISSION NO. 10**

This request is being responded to in accordance with and subject to objection number 8. Admitted.

**REQUEST FOR ADMISSION NO. 11**

Elemental phosphorus is on the CERCLA Hazardous Substances List.

**RESPONSE TO ADMISSION NO 11.**

The State objects to the definition of CERCLA Hazardous Substances list. See General Objection No. 3. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State admits.

**REQUEST FOR ADMISSION NO. 12**

The following substances are not on the CERCLA Hazardous Substances List: phosphate, orthophosphate, elemental nitrogen, and elemental copper.

**RESPONSE TO ADMISSION NO 12.**

The State objects to the definition of CERCLA Hazardous Substances list. See General Objection No. 3. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies that phosphate,

orthophosphate, and elemental copper "are not" on the CERCLA Hazardous Substances list. The State admits that elemental nitrogen is not on the CERCLA Hazardous substances list.

**REQUEST FOR ADMISSION NO. 13**

No phosphorus compounds, nitrogen compounds, zinc compounds, or copper compounds found in poultry litter are on the CERCLA Hazardous Substances List.

**RESPONSE TO ADMISSION NO.13**

The State objects to the definition of CERCLA Hazardous Substances list. See General Objection No. 3. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 14**

The following substances do not contribute to eutrophication in the Illinois River Watershed: nitrogen compounds, elemental arsenic, arsenic compounds, elemental zinc, zinc compounds, elemental copper, copper compounds, hormones and bacteria.

**RESPONSE TO REQUEST NO. 14.**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Further, the request is ambiguous because it seeks a response concerning the environmental effects of multiple substances and because Defendants do not define "contribute" and "eutrophication". This request is being responded to in accordance with and subject to objection number 8. Therefore, the Plaintiff can neither admit nor deny this statement in total, as written. The terms "eutrophication" and "contribute" may have variable definitions that will change the response. Also, the effects of the substances listed in this Request vary greatly with respect to their "contribution" to "eutrophication". Definitions of eutrophication vary in the scientific literature from its original application referring to increasing productivity of lakes to the more common and broader

definition used today referring to increasing productivity of all types of surface waters by inorganic nutrients and organic materials. It is also important to distinguish between natural versus anthropogenic eutrophication. Productivity of some types of surface waters increases naturally, but very slowly over very long periods of time by naturally occurring nutrients and organic materials accumulating within their basins. Anthropogenic eutrophication refers to the acceleration of the eutrophication process by nutrient and organic matter pollution from human activities. Nitrogen compounds directly stimulate productivity in lakes, reservoirs and streams. Indirectly, the following compounds would not "contribute" to eutrophication, but may retard productivity: elemental arsenic, arsenic compounds, elemental zinc, zinc compounds, elemental copper, copper compounds. It is possible that hormones may "contribute" to the productivity of bacteria, algae, cynobacteria and other aquatic organisms. Additionally, adding substantial amounts of bacteria to surface waters may increase abundances and activities of these organisms and thereby "contribute" to increased productivity and respiration.

**REQUEST FOR ADMISSION NO. 15**

Poultry litter is not on the CERCLA hazardous Substances List.

**RESPONSE TO REQUEST NO. 15**

The State objects to the definition of CERCLA Hazardous Substances list. See General Objection No. 3. Subject to and without waiver of this objection, the State admits. However, many of the constituents that make up "poultry litter" are contained on the CERCLA Hazardous Substance list as defined herein. Further, poultry litter and its constituents are hazardous substances for the purposes of CERCLA liability.

**REQUEST FOR ADMISSION NO. 16**

Bacteria levels in Oklahoma's streams are not a public health problem.

**RESPONSE TO REQUEST NO. 16**

Denied.

## IV. CAUSATION AND OTHER POTENTIAL SOURCES OF ALLEGED "HAZARDOUS SUBSTANCES"

**REQUEST FOR ADMISSION NO. 17**

There are fewer than 1,800 poultry houses currently being used to raise poultry in the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 17**

Denied.

**REQUEST FOR ADMISSION NO. 18**

Less than 30% of the poultry houses currently being used to raise poultry in the Illinois River Watershed are located in Oklahoma.

**RESPONSE TO ADMISSION NO. 18**

Admitted. However, it is irrelevant because waste generated in both states injures the natural resources located in Oklahoma.

**REQUEST FOR ADMISSION NO. 19**

There are multiple sources that contribute one or more of the following substances to the environment of the Illinois River Watershed: phosphorus compounds, elemental nitrogen, nitrogen compounds, elemental arsenic, arsenic compounds, elemental zinc, zinc compounds, elemental copper, copper compounds, hormones, and bacteria.

**RESPONSE TO ADMISSION NO. 19**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any

objection, the State denies that there are multiple sources that contribute elemental nitrogen, elemental arsenic, elemental zinc, and elemental copper. The State admits that there are multiple sources that contribute phosphorus compounds, nitrogen compounds, arsenic compounds, zinc compounds, copper compounds, hormones and bacteria to the environment of the IRW.

**REQUEST FOR ADMISSION NO. 20**

Waste water treatment plants ("WWTPs") contribute phosphorus to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 20**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection, the State denies, assuming for the purposes of this request, the request relates to elemental phosphorus and in accordance with and subject to objection number 8..

**REQUEST FOR ADMISSION NO. 21**

WWTPs contribute phosphorus compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 21**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because WWTPs do not contribute, in the sense of adding or supplying, phosphorus compounds to the "environment of the Illinois River Watershed" as defined herein because phosphorus compounds discharged from WWTPs already exist in the "environment" as defined. The State admits that certain WWTPs do release phosphorus

compounds to a "portion thereof," specifically the surface waters of the IRW pursuant to a federal discharge permit.

**REQUEST FOR ADMISSION NO. 22**

WWTPs contribute elemental nitrogen to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO.22**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request.

**REQUEST FOR ADMISSION NO. 23**

WWTPs contribute nitrogen compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 23**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection the State denies this request because WWTPs do not contribute, in the sense of adding or supplying, nitrogen compounds to the "environment of the Illinois River Watershed" as defined herein because nitrogen compounds discharged from WWTPs already exist in the "environment" as defined. The State admits that certain WWTPs do contribute nitrogen compounds to a "portion thereof," specifically the surface waters of the IRW pursuant to a federal discharge permit.

**REQUEST FOR ADMISSION NO. 24**

WWTPs contribute elemental arsenic to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 24**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 25**

WWTPs contribute arsenic compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 25**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because WWTPs do not contribute, in the sense of adding or supplying, arsenic compounds to the "environment of the Illinois River Watershed" as defined herein because arsenic compounds discharged from WWTPs already exist in the "environment" as defined. The State admits that certain WWTPs do contribute arsenic compounds to a "portion thereof," specifically the surface waters of the IRW pursuant to a federal discharge permit.

**REQUEST FOR ADMISSION NO. 26**

WWTPs contribute elemental zinc to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 26**

The State objects to this request on grounds of vagueness, ambiguity and relevance inasmuch as the term "contribute" is not defined with reference to amount. This request is being

responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 27**

WWTPs contribute zinc compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 27**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because WWTPs do not contribute, in the sense of adding or supplying, zinc compounds to the "environment of the Illinois River Watershed" as defined herein because zinc compounds discharged from WWTPs already exist in the "environment" as defined. The State admits that certain WWTPs do contribute zinc compounds to a "portion thereof," specifically the surface waters of the IRW pursuant to a federal discharge permit.

**REQUEST FOR ADMISSION NO. 28**

WWTPs contribute elemental copper to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 28**

The State objects to this request on grounds of vagueness, ambiguity and relevance inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 29**

WWTPs contribute copper compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 29**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because WWTPs do not contribute, in the sense of adding or supplying, copper compounds to the "environment of the Illinois River Watershed" as defined herein because copper compounds discharged from WWTPs already exist in the "environment" as defined. The State admits that certain WWTPs do contribute copper compounds to a "portion thereof," specifically the surface waters of the IRW pursuant to a federal discharge permit.

**REQUEST FOR ADMISSION NO. 30**

WWTPs contribute hormones to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 30** The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection, the State denies this request because WWTPs do not contribute, in the sense of adding or supplying, hormones to the "environment of the Illinois River Watershed" as defined herein because hormones discharged from WWTPs already exist in the "environment" as defined. The State admits that certain WWTPs do contribute hormones to a "portion thereof," specifically the surface waters of the IRW pursuant to a federal discharge permit.

**REQUEST FOR ADMISSION NO. 31**

WWTPs contribute bacteria to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 31**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection the State denies this request because WWTPs do not contribute, in the sense of adding or supplying, bacteria to the "environment of the Illinois River Watershed" as defined herein because bacteria discharged from WWTPs already exist in the "environment" as defined. The State admits that certain WWTPs do contribute bacteria to a "portion thereof," specifically the surface waters of the IRW pursuant to a federal discharge permit.

**REQUEST FOR ADMISSION NO. 32**

Plaintiffs have concluded that municipalities within the Illinois River Watershed should improve their wastewater treatment facilities.

**RESPONSE TO REQUEST NO. 32** The State objects to the term "Plaintiffs" as there is only one Plaintiff, the State of Oklahoma. The State further objects to this request as it vague as to what "concluded" means. There have been administrative orders issued by the State regarding WWTPs and the State has entered into a Joint Statement of Principles and Actions with the State of Arkansas in order to reduce phosphorus levels from WWTPs in Arkansas. The State admits only to the extent that the State has issued orders and entered into agreements in order to improve WWTP facilities; however the State denies that it has "concluded" that all municipalities should improve their facilities.

**REQUEST FOR ADMISSION NO. 33**

Sewage ponds owned or maintained by cities or towns within the Illinois River Watershed have overflowed during storms and discharged untreated sewage into the streams of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 33**

The State admits that, on limited occasions, a sewage pond owned or maintained by a city or town overflowed during a storm. After making a reasonable inquiry, the State cannot state with certainty whether all such overflows reached streams in the Illinois River Watershed.

**REQUEST FOR ADMISSION NO. 34**

When WWTPs release waste from their waste water treatment ponds into streams within the Illinois River Watershed without full treatment of that water, such dumping increases bacteria levels in the stream.

**RESPONSE TO REQUEST NO. 34**

The State objects to the term "dumping" as any "release" is a permitted discharge under the Clean Water Act and is not "dumping." Subject to and without waiver of this objection, the State admits that any discharge from a WWTP not done in accordance with their pre-treatment requirements is an unlawful discharge and can increase bacteria in any body of water receiving such discharge.

**REQUEST FOR ADMISSION NO. 35**

There are more than 70,000 septic systems in the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 35**

After making a reasonable inquiry, the State is unable to admit or deny this request because it currently lacks full information necessary to definitively respond.

**REQUEST FOR ADMISSION NO. 36**

Septic systems contribute elemental phosphorus to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 36**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 37**

Septic systems contribute phosphorus compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO.37**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because septic systems do not contribute, in the sense of adding or supplying, phosphorus compounds to the "environment of the Illinois River Watershed" as defined herein because phosphorus compounds released from septic systems already exist in the "environment" as defined. The State admits that septic systems do contribute phosphorus compounds to a "portion thereof," specifically the soils of the IRW.

**REQUEST FOR ADMISSION NO. 38**

Septic systems contribute elemental nitrogen to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 38**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in

accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 39**

Septic systems contribute nitrogen compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 39**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because septic systems do not contribute, in the sense of adding or supplying, nitrogen compounds to the "environment of the Illinois River Watershed" as defined herein because nitrogen compounds released from septic systems already exist in the "environment" as defined. The State admits that septic systems do contribute nitrogen compounds to a "portion thereof," specifically the soils of the IRW.

**REQUEST FOR ADMISSION NO. 40**

Septic systems contribute elemental arsenic to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 40**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 41**

Septic systems contribute arsenic compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 41**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because septic systems do not contribute, in the sense of adding or supplying, arsenic compounds to the "environment of the Illinois River Watershed" as defined herein because arsenic compounds released from septic systems already exist in the "environment" as defined. The State admits that septic systems do contribute arsenic compounds to a "portion thereof," specifically the soils of the IRW.

**REQUEST FOR ADMISSION NO. 42**

Septic systems contribute elemental zinc to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO.42**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 43**

Septic systems contribute zinc compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 43**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of this objection the State denies this request because septic systems do not contribute, in the sense of adding or supplying, zinc compounds to the "environment of the Illinois River Watershed" as defined herein because zinc compounds released from septic systems already exist in the "environment" as defined. The State admits that septic systems do contribute zinc compounds to a "portion thereof," specifically the soils of the IRW.

**REQUEST FOR ADMISSION NO. 44**

Septic systems contribute elemental copper to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 44**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 45**

Septic systems contribute copper compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 45**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any

objection, the State denies this request because septic systems do not contribute, in the sense of adding or supplying, copper compounds to the "environment of the Illinois River Watershed" as defined herein because copper compounds released from septic systems already exist in the "environment" as defined. The State admits that septic systems do contribute copper compounds to a "portion thereof," specifically the soils of the IRW.

**REQUEST FOR ADMISSION NO. 46**

Septic systems contribute hormones to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 46**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection, the State denies this request because septic systems do not contribute, in the sense of adding or supplying, hormones to the "environment of the Illinois River Watershed" as defined herein because hormones released from septic systems already exist in the "environment" as defined. The State admits that septic systems do contribute hormones to a "portion thereof," specifically the soils of the IRW.

**REQUEST FOR ADMISSION NO. 47**

Septic systems contribute bacteria to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 47**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection, the State denies this request because septic systems do not contribute, in the sense of adding or supplying, bacteria to the "environment of the Illinois River Watershed" as defined herein because bacteria released from septic systems already exist in the "environment" as

defined. The State admits that septic systems do contribute bacteria to a "portion thereof," specifically the soils of the IRW.

**REQUEST FOR ADMISSION NO. 48**

Portions of the stream banks within the Illinois River Watershed have eroded over the past 50 years.

**RESPONSE TO REQUEST NO. 48**

Admitted.

**REQUEST FOR ADMISSION NO. 49**

Stream bank erosion contributes elemental phosphorus to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 49**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 50**

Stream bank erosion contributes phosphorus compounds to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 50**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State admits to the extent that stream bank erosion conveys phosphorus

compounds already contained within, but does not independently contribute phosphorus compounds to surface waters.

**REQUEST FOR ADMISSION NO. 51**

Stream bank erosion contributes elemental nitrogen to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 51**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 52**

Stream bank erosion contributes nitrogen compounds to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 52**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State admits to the extent that stream bank erosion conveys nitrogen compounds already contained within, but does not independently contribute nitrogen compounds to surface waters.

**REQUEST FOR ADMISSION NO. 53**

Stream bank erosion contributes elemental arsenic to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 53**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection the State denies.

**REQUEST FOR ADMISSION NO. 54**

Stream bank erosion contributes arsenic compounds to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 54**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State admits to the extent that stream bank erosion conveys arsenic compounds already contained within, but does not independently contribute arsenic compounds to surface waters.

**REQUEST FOR ADMISSION NO. 55**

Stream bank erosion contributes elemental zinc to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 55**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 56**

Stream bank erosion contributes zinc compounds to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 56**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State admits to the extent that stream bank erosion conveys zinc compounds already contained within, but does not independently contribute zinc compounds to surface waters.

**REQUEST FOR ADMISSION NO. 57**

Stream bank erosion contributes elemental copper to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 57**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection the State denies.

**REQUEST FOR ADMISSION NO. 58**

Stream bank erosion contributes copper compounds to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 58**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in

accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State admits to the extent that stream bank erosion conveys copper compounds already contained within, but does not independently contribute copper compounds to surface waters.

**REQUEST FOR ADMISSION NO. 59**

Stream bank erosion contributes hormones to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 59**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection, the State admits to the extent that stream bank erosion conveys hormones already contained within, but does not independently contribute hormones to surface waters.

**REQUEST FOR ADMISSION NO. 60**

Stream bank erosion contributes bacteria to surface waters within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 60**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection, the State admits to the extent that stream bank erosion conveys bacteria already contained within, but does not independently contribute bacteria to surface waters.

**REQUEST FOR ADMISSION NO. 61**

The removal of trees and other vegetation from stream banks has caused increased stream bank erosion within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 61**

Admitted.

**REQUEST FOR ADMISSION NO. 62**

The construction of buildings, roads, and parking lots within the Illinois River Watershed has caused increased erosion within the Illinois River Watershed.

**RESPONSE TO REQUEST NO 62.**

The State objects to this request as it is vague and ambiguous inasmuch as the request does not identify any specific construction projects which have increased erosion in the Illinois River Watershed.

**REQUEST FOR ADMISSION NO. 63**

Allowing livestock to access streams increases erosion of the stream's banks.

**RESPONSE TO REQUEST NO. 63**

Admitted.

**REQUEST FOR ADMISSION NO. 64**

Livestock have caused stream bank erosion within the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 64**

Admitted.

**REQUEST FOR ADMISSION NO. 65**

Cattle deposit manure directly into streams in the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 65**

Admitted, to the extent that cattle may at some time deposit manure directly into streams of the IRW.

**REQUEST FOR ADMISSION NO. 66**

Constituents from cattle manure deposited onto fields and pastures in the Illinois River Watershed by grazing cattle have run off into streams in the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 66**

Admitted, to the extent that cattle may at some time deposit manure directly into streams of the IRW, however, some of the constituents contained in cow manure is a direct result of the land application of poultry waste on to fields and pastures.

**REQUEST FOR ADMISSION NO. 67**

The most polluted streams in Oklahoma are in western Oklahoma where cattle access streams.

**RESPONSE TO REQUEST NO. 67**

The State objects to this request as it is irrelevant to the facts and issues in this case. Further, the State objects to the term "most polluted" as it is vague and ambiguous. Subject to and without waiver of this objection, the State denies.

**REQUEST FOR ADMISSION NO. 68**

Cattle manure contributes elemental phosphorus to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 68**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 69**

Cattle manure contributes phosphorus compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 69**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection the State denies this request because cattle do not contribute, in the sense of adding or supplying, phosphorus compounds to the "environment of the Illinois River Watershed" as defined herein because phosphorus compounds released from cattle already exist in the "environment" as defined. The State admits that cattle do release phosphorus compounds to a "portion thereof," the IRW.

**REQUEST FOR ADMISSION NO. 70**

Cattle manure contributes elemental nitrogen to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 70**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 71**

Cattle manure contributes nitrogen compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 71**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because cattle do not contribute, in the sense of adding or supplying, nitrogen compounds to the "environment of the Illinois River Watershed" as defined herein because nitrogen compounds released from cattle already exist in the "environment" as defined. The State admits that cattle do release nitrogen compounds to a "portion thereof," the IRW.

**REQUEST FOR ADMISSION NO. 72**

Cattle manure contributes elemental arsenic to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 72**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 73**

Cattle manure contributes arsenic compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 73**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any

objection the State denies this request because cattle do not contribute, in the sense of adding or supplying, arsenic compounds to the "environment of the Illinois River Watershed" as defined herein because arsenic compounds released from cattle already exist in the "environment" as defined. The State admits that cattle do release arsenic compounds to a "portion thereof," the IRW.

**REQUEST FOR ADMISSION NO. 74**

Cattle manure contributes elemental zinc to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 74**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 75**

Cattle manure contributes zinc compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 75**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because cattle do not contribute, in the sense of adding or supplying, zinc compounds to the "environment of the Illinois River Watershed" as defined herein because zinc compounds released from cattle already exist in the "environment" as defined. The State admits that cattle do release zinc compounds to a "portion thereof," the IRW.

**REQUEST FOR ADMISSION NO. 76**

Cattle manure contributes elemental copper to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 76**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.

**REQUEST FOR ADMISSION NO. 77**

Cattle manure contributes copper compounds to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 77**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies this request because cattle do not contribute, in the sense of adding or supplying, copper compounds to the "environment of the Illinois River Watershed" as defined herein because copper compounds released from cattle already exist in the "environment" as defined. The State admits that cattle do release copper compounds to a "portion thereof," of the IRW.

**REQUEST FOR ADMISSION NO. 78**

Cattle manure contributes hormones to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 78**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection the State admits.

**REQUEST FOR ADMISSION NO. 79**

Cattle manure contributes bacteria to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 79**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. Subject to and without waiver of this objection, the State admits.

**REQUEST FOR ADMISSION NO. 80**

If you answered yes to any one of the requests for admission numbered 68-79, admit that cattle manure contributes a greater amount of the substance addressed in that request or requests to the environment of the Illinois River Watershed than poultry litter.

**RESPONSE TO REQUEST NO. 80**

Denied.

**REQUEST FOR ADMISSION NO. 81**

Manure from wildlife contributes elemental phosphorus to the environment of the Illinois River Watershed.

**RESPONSE TO REQUEST NO. 81**

The State objects to this request on grounds of vagueness and ambiguity inasmuch as the term "contribute" is not defined with reference to amount. This request is being responded to in accordance with and subject to objection number 8. Subject to and without waiver of any objection, the State denies.